UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*.), the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930, (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. § 151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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PLANT QUARANTINE ACT

CONSENT DECISIONS

In re: BRUCE CARTWRIGHT.
A.Q. Docket No. 92.
Decision and Order filed July 15, 1987.

Brucellosis - Interstate movement of cattle without certificate and permit - Failure to deny or otherwise respond to allegations of complaint.

Cynthia Koch, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (Act), for a violation of the regulations issued under the Act that govern the interstate movement of cattle because of brucellosis (9 C.F.R. § 78.1 *et seq.*), hereinafter referred to as the regulations.

This proceeding was instituted by a complaint filed on July 31, 1984, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about April 2, 1983, respondent had moved at least one cow interstate from Arkansas, a Class B state, to Louisiana, in violation of section 78.9 (e)(3)(ii) of the regulations (9 C.F.R. § 78.9(c)(3)(ii)), in that at least one cow was not accompanied by a certificate, as required. Additionally, the complaint alleged that on or about April 2, 1983, respondent had moved at least one cow interstate from Arkansas, a Class B state, to Louisiana, in violation of section 78.9 (c)(3)(ii) of the regulations (9 C.F.R. § 78.9(c)(3)(ii)), in that at least one cow was not accompanied by a permit for entry, as required.

In response to the complaint, respondent filed a letter dated August 26, 1984, in which he requested an oral hearing. However, in the letter respondent failed to deny or other wise respond to any of the allegations in the complaint. In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent is deemed to have admitted the material allegations in the complaint, and, therefore, respondent has waived his right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent is deemed to have admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Respondent, Bruce Cartwright, is an individual whose address is Route 2, Box 2, Plain Dealing, Louisiana 71064.

2. On or about April 2, 1983, respondent moved at least one cow interstate from Arkansas, a Class B state, to Louisiana in violation of section 78.9(c)(3)(ü) of the regulations (9 C.F.R. § 78.9(c)(3)(ü)), in that at least one cow was not accompanied by a certificate, as required.

3. On or about April 2, 1983, respondent moved at least one cow interstate from Arkansas, a Class B state, to Louisiana, in violation of section 78.9(c)(3)(ü) of the regulations (9 C.F.R. § 78.9(c)(3)(ii), in that at least one cow was not accompanied by a permit for entry, as required.

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulation promulgated thereunder. Therefore, the following order is issued.

Order

Respondent, Bruce Cartwright, is hereby assessed a civil penalty of one thousand dollars ($1,000.00) ($500.00 per violation) which shall be payable to the "Treasurer of the United States" by a certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final August 24, 1987.-Editor]

In re: ENOS HOWLE and DR. HENRY A. TILLETT.
A.Q. Docket No. 181.
Dismissal filed August 28, 1987.

Joseph Pembroke, for Complainant.
Respondent, pro se.
Dismissal issued by Victor W. Palmer, Administrative Law Judge.

DISMISSAL

Upon consideration of the documents filed in the above-captioned case, it is hereby dismissed.

In re: CLIFF R. LANTHROP, INC., and RANDY LANTHROP.
A.Q. Docket No. 269.
Dismissal filed August 26, 1987.

Kevin Thiemann, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, the complaint in the above-captioned proceeding is hereby dismissed.

In re: PACKERLAND PACKING COMPANY and STEVEN C. DEMARAY.
A.Q. Docket No. 283.
Decision and Order filed June 25, 1987.

Brucellosis - Interstate movement of cattle without certificate - Failure to file answer.

Jaru Ruley, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER AS TO STEVEN C. DEMARAY

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 C.F.R. § § 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § § 70.1 *et seq.*

This proceeding was instituted by a complaint filed on July 28, 1986, by the administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that during the month of June 1985, on at least twenty-two separate occasions, the respondent moved cattle interstate from the States of Montana, Colorado, and South Dakota, to Scottsbluff, Nebraska, in violation of sections 78.9(a) and 78.9(b)(3)(ii) of the regulations (9 C.F.R. § § 78.9(a) and 78.9(b)(3)(ii) in that the cattle, which were moved interstate for other than immediate slaughter and to other than a quarantined feedlot, were not accompanied by a certificate. The complaint was personally served upon the respondent on February 17, 1987. The respondent, Steven C. Demaray, failed to file an answer. This failure to file an answer is deemed an admission of the allegations in the complaint and a waiver of hearing. (See 7 C.F.R. § § 1.136(c) and 1.139).

Accordingly, the material facts as to Steven C. Demaray, alleged in the complaint, are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Steven C. Demaray, is an individual whose mailing address is c/o Leyghton Demaray, Route 1, Rudd, Iowa 50471.

2. On or about June 1, 1985, the respondent moved interstate at least one (1) cow, over twenty-four months of age, from St. Onge, South Dakota, to Scottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations (9 C.F.R. § 78.9(b)(3)(ii) in that the cow was moved interstate for other than immediate slaughter and to other than a quarantine feedlot without being accompanied by a certificate, as required.

3. On or about June 1, 1985, the respondent moved interstate thirty-one (31) bulls from Billings, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

4. On or about June 1, 1985, the respondent moved interstate forty-five (45) cows, from Ekalaka, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(aa)) in that the cows were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

5. On or about June 2, 1985, the respondent moved interstate at least one (1) bull, over twenty-four months of age, from St. Onge, South Dakota, to Scottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations 9 C.F.R. § 78.9(b)(3)(ii) in that the bull was moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

6. On or about June 3, 1985, the respondent moved interstate at least one) cow, over twenty-four months of age, from St. Onge, South Dakota, to cottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations 9 C.F.R. § 78.9(b)(3)(ii)) in that the cow was moved interstate for other than mmediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

7. On or about June 6, 1985, the respondent moved interstate at least hree (3) cattle, over twenty-four months of age, from La Junta, Colorado, to cottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations 9 C.F.R. § 78.9(b)(3)(ii) in that the cattle were moved interstate for other han immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

8. On or about June 6, 1985, the respondent moved interstate at least orty-seven (47) cattle, from Billings, Montana, to Scottsbluff, Nebraska, in iolation of section 78.9(a) of the regulations (9 C.F.R. § 78.9 (a)) in that the attle were moved interstate for other than immediate slaughter and to other han a quarantined feedlot without being accompanied by a certificate, as required.

9. On or about June 6, 1985, the respondent moved interstate fifty-eight cattle from Billings, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9 (a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

10. On or about June 6, 1985, the respondent moved interstate thirty-two (32) bulls from Billings, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the bulls were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

11. On or about June 6, 1985, the respondent moved interstate forty-eight (48) cattle from Lewistown, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

12. On or about June 7, 1985, the respondent moved interstate forty (40) cattle from Billings and Lewistown, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

13. On or about June 8, 1985, the respondent moved interstate at least three (3) cattle, over twenty-four months of age, from Belle Fourche, South Dakota, to Scottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations (9 C.F.R. § 78.9(b)(3)(ii) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

14. On or about June 19, 1985, the respondent moved interstate fifty (50) cattle from Lewistown, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9 (a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

15. On or about June 19, 1985, the respondent moved interstate fifty-one (51) cattle from Billings, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

16. On or about June 20, 1985, the respondent moved interstate forty-nine (49) cattle from Billings, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by certificate, as required.

17. On or about June 20, 1985, the respondent moved interstate at least one (1) cow, over twenty-four months of age, from Belle Fourche, South Dakota, to Scottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations (9 C.F.R. § 78.9(b)(3)(ii)) in that cow was moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

18. On or about June 21, 1985, the respondent moved interstate fifty-two (52) cattle from Billings, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the cattle were

moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

19. On or about June 21, 1985, the respondent moved interstate fifty-seven (57) cattle from Billings, Montana, to Scottsbluff, Nebraska, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

20. On or about June 21, 1985, the respondent moved interstate at least nine (9) cattle, over twenty-four months of age, from Belle Fourche, South Dakota, to Scottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations (9 C.F.R. § 78.9(b)(3)(ii) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

21. On or about June 22, 1985, the respondent moved interstate at least seven (7) cattle, over twenty-four months of age, from Wray, Colorado, to Scottsbluff, Nebraska, in violation of section 78.9(b)(3)(ii) of the regulations (9 C.F.R. § 78.9 (b)(3)(ii)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

22. On or about June 28, 1985, the respondent moved interstate thirty-
ven (37) bulls from Billings, Montana, to Scottsbluff, Nebraska, in violation
section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the bulls were
oved interstate for other than immediate slaughter and to other than a
arantined feedlot without being accompanied by a certificate, as required.

23. On or about June 28, 1985, the respondent moved interstate fifty (50)
attle from Billings, Montana, to Scottsbluff, Nebraska, in violation of section
78.9(a) of the regulations (9 C.F.R. § 78.9(a)) in that the cattle were moved interstate for other than immediate slaughter and to other than a quarantined feedlot without being accompanied by a certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the espondent, Steven C. Demaray, has violated sections 78.9(a) and 8.9(b)(3)(ii) of the regulations (9 C.F.R. § 78.9(a) and 78.9(b)(3)(ii)).

Therefore, the following order is issued.

Order

Respondent, Steven C. Demaray, is hereby assessed a civil penalty of eleven thousand dollars ($11,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to the U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal

to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final August 6, 1987.-Editor]

In re: RAYMOND W. SMITH.
A.Q. Docket No. 307.
Default Decision and Order filed June 25, 1987.

Brucellosis - Interstate movement of cattle without certificate and permit - Failure to file answer.

Lori Monfort, for Complainant.
Respondent, Pro se.
Default Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § § 111 and 120) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated Part 78 of the regulations promulgated under the Act (9 C.F.R. Part 78). A copy of the complaint and the rules of practice governing proceedings under the Act (9 C.F.R. Part 78). A copy of the complaint and the rules of practice governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on February 24, 1987.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after receipt of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent has failed to respond in the required manner to allegations in the complaint and has failed to request an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the rules of practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Raymond W. Smith, respondent, is an individual whose address is 2654 Hwy 305, Olive Branch, Mississippi 38654.

2. On or about March 1, 1984, respondent moved interstate two (2) cattle from Memphis, Tennessee to Olive Branch, Mississippi in violation of section 78.9(c)(3)(ii) of the regulations (9 C.F.R. § 78.9(c)(3)(ii)) because the cattle were not accompanied interstate by a certificate, as required.

3. On or about March 1, 1984, respondent moved interstate two (2) cattle from Memphis, Tennessee to Olive Branch, Mississippi in violation of section 78.9(c)(3)(ii) of the regulations (9 C.F.R. § 78.9(c)(3)(ii) because the cattle were not accompanied interstate by a permit for entry, as required.

Conclusion

Respondent has failed to respond in the required manner to the allegations of the complaint. By reason the Findings of Fact set forth above, respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent Raymond W. Smith is hereby assessed a civil penalty of one housand dollars ($1,000), which shall be payable to the "Treasurer of the Jnited States,"by certified check or money order, and which shall be sent to USDA, APHIS Field Servicing Office, Accounting Section, Butler Square Vest, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403," within hirty (30) days from the effective date of this order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 307.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of his Decision and Order upon respondent unless respondent appeals to the udicial Officer pursuant to section 1.145 of the Rules of Practice applicable o this proceeding (7 C.F.R. § 1.145).

[This decision and order became final August 4, 1987.-Editor]

In re: JAMES SUMRALL.
A.Q. Docket No. 323.
Dismissal filed August 26, 1987.

Kevin Thiemann, for Complainant.
Respondent, pro se.
Dismissal issued by Victor W. Palmer, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, the complaint in the above-captioned proceeding is hereby dismissed.

In re: ALTON GRAY III, d/b/a JAY GRAY'S PARK.
AWA Docket No. 343.
Order filed August 28, 1987.

John Griffith, for Complainant.
Matthew Lewiss, Westerly, Rhode Island for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case.

In support of complainant's motion, complainant has stated that respondent is currently operating in compliance with the Act, regulations and standards.

WHEREFORE, FOR GOOD CAUSE SHOWN, it is hereby ordered that this complaint is dismissed without prejudice.

In re: VERNON STILL, d/b/a ROLLING ACRES KENNEL.
AWA Docket No. 356.
Order filed August 25, 1987.

Robert A. Ertman, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case, stating that further proceeding is not necessary to effectuate the purpose of the Animal Welfare Act.

Accordingly, it is ordered that the complaint in this action be, and hereby is, dismissed, without prejudice.

In re: W. DONALD RICHMOND and TILLIE RICHMOND, d/b/a RICHMOND'S EGG FARM.
ERCIA Docket No. 11.
Decision and Order filed July 15 1987.

Failure to file handler reports - Failure to remit assessment obligations to AEB - Admission of material facts alleged in complaint.

Robert M. Frisby, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS

Preliminary Statement

This is a disciplinary proceeding under the Egg Research and Consumer Information Act, 7 U.S.C. § § 2701-2718 ("Act"), instituted by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, on April 3, 1987, charging that the respondents willfully violated the Egg Research and Promotion Order, 7 C.F.R. § § 1250.301-1250.363 ("Order"), and the Rules and Regulations, 7 C.F.R. § § 12.50.500-1250.552 ("Regulations"), promulgated under the Act.

Copies of the complaint and Rules of Practice, 7 C.F.R,. § § 1.130-1.151, governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail.

The complaint alleged, *inter alia*, that respondents violated the order and Regulations by failing to remit $2,046.60 in assessment obligations to the American Egg Board ("AEB") for the fourteen reporting periods from August 1 to September 30, 1982, and from January 1 to December 31, 1983, and by failing to submit handler reports and remit assessment obligations to the AEB for each reporting period from January 1, 1984, to April 3, 1987. When the complaint was filed, the amount of assessment obligations due for these latter reporting periods had not yet been determined by the AEB or by complainant.

On April 23, 1987, respondents filed an answer admitting the material facts alleged in the complaint. On June 1, 1987, respondents material facts alleged in the complaint. On June 1, 1987, respondents filed thirty-six collecting handler reports for the period fron May 1, 1984, to April 30, 1987, with the AEB. These reports indicate that $3,784.25 in assessment obligations were collected by respondents during the period. These reports, although not timely filed, appear to accurately reflect the respondents' obligations under the Act, Order and Regulations. Respondents' assessment obligations now total at least $5,830.85, which includes $2,046.60 in assessment obligations admitted by respondents in their answer, and $3,784.25 in assessment obligations reported to the AEB on June 1, 1987. Accordingly, the material facts alleged in the complaint, as revised to reflect the actual amount of assessment obligations owed by respondents for the period from May 1, 1984, to April 30, 1987, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. W. Donald Richmond and Tillie Richmond, hereinafter referred to as the respondents, are partners doing business as Richmond's Egg Farm and a person as defined by the Act, 7 U.S.C. § 2702 (b). Respondents' principal place of business is located at Houston, Texas, and their mailing address is 14114 Reeveston Road, Houston, Texas 77039.

2. Respondents, at all times material herein, were engaged in business as an egg handler subject to the Act, the Order, and the Regulations.

3. Respondents, at all times material herein, were a collecting handler as defined in the Order, 7 C.F.R. § 1250.348, and the Regulations, 7 C.F.R. § 1250.516, and were required to submit handler reports and to remit assessment obligations to the American Egg Board on or before the fifteenth day after the end of each reporting period.

4. The American Egg Board ("AEB") is the agency duly appointed by the Secretary of Agriculture to adnminister the Order.

5. For each reporting period from January 1, 1984, to April 3, 1987, respondents have violated the Order and the Regulations promulgated under the act by failing to file handler reports with the AEB, as required by section 1250.351 of the Order and section 1250.529 of the Regulations.

6. For each reporting period from August 1 to September 30, 1982, from January 1 to December 31, 1983, and fro May 1, 1984, to April 30, 1987, respondents have violated the Order and the regulations promulgated under the Act by failing to remit assessment obligations to the AEB as required by sections 1240.347 and 1250.348 of the Order and sections 1250.514-1250.517 of the Regulations. The amount so owed totalled $5,830.85 as of April 30, 1987.

7. Respondents have violated the Order and the Regulations promulgated under the Act by failing to remit assessment obligations to the AEB as required by sections 1250.347 and 1250.348 of the Order andk sections 1250.514-1250.517 of the Regulations for each reporting period from January 1, 1984, to April 30, 1984. The amount of the assessment obligations due for these reporting periods has not been reported by respondents and has not yet been determined by the AEB or by complainant.

Conclusions

By reason of the facts set forth in the Findings of Fact above, the respondent have willfully violated sections 1250.347, 1250.348 and 1250.351 of the Order, 7 C.F.R. §§ 1250.347, 1250.348 and 1250.351, and sections 1250.514-1250.517 and 1250.529 of the Regulations, 7 C.F.R.§§ 1250.514-1250.517 and 1250.529, promulgated under the Act.

Order

Respondents W. Donald Richmond and Tillie Richnmond, their agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from violating the provisions of the Order and the Regulations promulgated under the Act by failing to file handler reports and remit assessment obligations to the AEB each reporting period on a timely

basis, and by failing to promptly submit to the AEB all overdue handler reports and remit to the AEB all overdue assessment obligations, totalling $5,830.85 for the fifty reporting periods from August 1 to September 30, 1982, from January 1 to December 31, 1983, and from May 1, 1984 to April 30, 1987, and an as yet unreported and unaudited amound for the four reporting periods from January 1 to April 30, 1984.

Respondents are assessed a civil penalty of $45,000 to be paid by certified check or money order made to the order of the Treasurer of the United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings thirty-five days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. § § 1.142 and 1.145.

Copies hereof shall be served uupon the parties.

[This decision and order became final August 24, 1987.-Editor]

In re: OSCAR BLACK, III and, CUSTOM CATTLE COMPANY, INC.
P&S Docket No. 6666.
Supplemental Order filed August 14, 1987.

Allan R. Kahan, for Complainant.
Kent F. Hudson, Purris, MS, for Respondent.
Respondent, Pro se.
Supplemental Order issued by Victor W. Palmer, Acting Chief Administrative Law Judge.

SUPPLEMENTAL ORDER

On January 21, 1987, an order was issued in the above-captioned matter, which *inter alia*, suspended respondent as a registrant under the Act for a period of one (1) year, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of one hundred eighty (180) days upon demonstration by respondent that the unpaid livestock seller has been paid in full.

Respondent has now demonstrated that the livestock sellers have been paid in full. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued January 21, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: TOMMY BOULDIN.
P&S Docket No. 6736.
Supplemental Order filed August 11, 1987.

Roberta Swartzendruber, for Complainant.
Gerard D. Eftink, Kansas City, Missouri, for Respondent.
Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On June 12, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of two weeks and thereafter until he demonstrates that the storage in his Custodial Account for Shippers' Proceeds has been eliminated.

Complainant has now received information that the storage in respondent's Custodial Account for Shippers' Proceeds has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 12, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: JOHN BUCCHOLZ.
P&S Docket No. 6593.
Supplemental Order filed August 11, 1987.

Roberta Swartzendruber, for Complainant.
Daniel W. Olsen, Kansas city, Missouri, for Respondent.
Supplemental Order issued by Dorothea A Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 15, 1985, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a respondent as a registrant under the Act for a period of nine months and thereafter until he demonstrates that he is no longer insolvent.

Complainant has now received information that respondent is no longer insolvent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 15, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: MURFREESBORO LIVESTOCK MARKET, INC., AND CARLTON REEVES.
P&S Docket No. 6646.
Decision and Order filed August 13, 1987.

Improper maintenance of custodial account for shippers' proceeds - Failure to pay, when due, the full purchase price of livestock - Conversion of consigned livestock - Improper purchases by market from consignment.

The Judicial Officer affirmed Judge Weber's order suspending respondent Murfreesboro Livestock Market, Inc., as a registrant for 1 year, prohibiting respondent Carlton Reeves from engaging in business subject to the Act for 1 year, jointly and severally assessing a $10,000 civil penalty against respondents, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; converting consigned livestock for their own use, substituting other livestock for the converted livestock, and paying the consignors on the basis of the sale price of the substituted livestock; representing to consignors that consigned livestock had died when, in fact, the livestock was sold through the market and the proceeds from the sale of such livestock were converted to the use of the market, its owners, officers, agents or employees; and failing to disclose and ownership or financial interest in the market on accounts of sale issued to consignors when the market or other individuals associated with the market purchase livestock out of consignment at the market. The failure of a market agency to maintain its custodial account in accordance with the requirements of the regulations is a violation of §§ 307 and 321(a) of the Act. The existence of a line of credit from a bank does not relieve a market agency of its legal obligation to strictly maintain its custodial account. Willfulness defined. Respondents violated § 312 (a) of the Act when the market's president failed to deposit an amount equal to the proceeds receivable from his own purchases to the respondents' custodial account. Switching consigned cattle with other cattle and falsely reporting one consigned head as dead violates § 312(a) of the Act. Failure to disclose to the consignor that the market's president purchased consigned livestock for speculation violates § 312(a) of the Act. Respondents' failure to call the wife of the market's president as a witness gives rise to an inference that her testimony would have been adverse, since she handled the paper work involved in transactions at issued in this case. The custodial account violations are serious even thou there was no injury, since it is the duty of P&S to prevent potential injury by stopping unlawful practices in the incipiency. Severe sanction policy explained, and severe sanctions imposed under the P&S Act in recent years summarized.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on December 31, 1986, by Administrative Law Judge William J. Weber (ALJ) suspending respondent Murfreesboro Livestock Market, Inc., as a registrant for 1 year, prohibiting respondent Carlton Reeves from engaging in business subject to the Act for 1 year, jointly and severally assessing a $10,000 civil penalty against respondents, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; converting consigned livestock to their own use, substituting other livestock for the converted livestock, and paying the consignors on the basis of the sale price of the substituted livestock; representing to consignors that consigned livestock had died when, in fact, the livestock was sold through the market and the proceeds from the sale of such livestock were converted to the use of the market, its owners, officers, agents or employees; and failing to disclose an ownership or financial interest in the market on accounts of sale issued to consignors when the market or other individuals associated with the market purchase livestock out of consignment at the market.

On February 5, 1987, respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. § § 556 and 557 has been delegated (7 C.F.R. § 2.35).** On March 2, 1987, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with a few changes too minor to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

The complaint charges violations of the Packers and Stockyards Act (7 USC 181 *et seq.*, "Act") concerning the custodial account; failure to fully disclose and timely pay for purchases of consigned cattle by Carlton Reeves, an officer of respondent's corporation; fraudulent substitution of cattle, and

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* See generally Campbell, *The Packers and Stockyards Act Regulatory Program, in 1 Davidson, Agricultural Law*, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

falsely reporting the death and failure to pay for one consigned head.[1]

Respondents deny any and all alleged violations, albeit admitting, expressly or by reasonable implication, many of the alleged facts. Essentially, respondents' attempt to explain or justify their actions as matching or surpassing the statutory and regulatory requirements, or as merely innocent mistakes.

Respondents argue that they caused no harm or loss to any consignor, that all consignors were timely and properly paid, that all checks were honored by the bank when presented for payment, and they fully cooperated with the investigators.

Respondents contend that some isolated mistakes or mix-ups occurred in keeping records or identifying cattle, but no violations occurred and no consignors ever suffered any losses of any nature. Respondents argue that they had equal or better alternative security arrangements for their custodial account than required by the regulations. No late payments or losses to consignors confirm this, they contend.

Respondents argue that they were hurt in their defense by a fire that destroyed some records which would have shown only innocent "paper mistakes" occurred--not the misconduct complainant alleged.

The evidence preponderates in favor of complainant. Respondents' contention that their conduct was essentially harmless, or equivalent to regulatory requirements, is too narrowly based and falls far short of meeting the industry-wide problem.[2] Credibility factors weigh heavily in favor of complainant, and against respondents.

Respondents argue the recommended sanction is too severe, out-of-line with precedents, and that mitigating factors more than justify reducing it. However, the record fails to show/establish any factors recognized in USDA precedents as mitigational. To the contrary, respondent Carlton Reeves agreed to cease violating custodial account regulations, but has failed to keep his word and has violated the cease and desist order. *In re Carlton B. Reeves,* 33 Agric. Dec. 1077 (1974).

In addition, respondents' violations here go beyond merely paper-work errors or careless, but innocent-hearted mistakes or misunderstanding. The evidence establishes an intention to deceive and defraud.

Finally, great weight must be given to the sanctions recommended by complainant. *In re George W. Saylor, Jr.,* 44 Agric. Dec. [2238, 2658 (1985)]; *In re Esposito,* 38 A.D. 613, 624-625 (1979); *In re Worsley,* 33 A.D. 1547, 1556-1571 (1974).

I. Findings of Fact

A. Identification and Jurisdictional

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[1] The complaint was filed 12/17/85. It alleged violations of sections 307, 312(a), and 409 of the Act (7 USC 208, 213(a), and 228b), as well as the implementing regulations, 9 CFR sections 201.42 and 201.56. Trial of the issues took place 7/29-30/86 in Nashville, Tennessee. The last briefs were filed 10/17/86.

[2] The obligation of complainant is to prevent or at least minimize losses and injury. The regulatory system must match the industry-wide problems, and maintain confidence in fiduciary relationships *In re Tommy J. Hines and Bobby T. Tindel,* 35 Agric. Dec. 113, 124 (1976).

corporate respondent), is a corporation organized and existing under the laws of the State of Tennessee, with its principal place of business located at Murfreesboro, Tennessee. Its mailing address is c/o Box 94, Hohenwald, Tennessee 38462. (ANS. 1)

2. Corporate respondent is, and at all times material herein was:
   (a) Engaged in the business of selling livestock on a commission basis; and
   (b) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for its own account. (ANS. 1)

3. Carlton Reeves (hereinafter referred to as respondent Reeves) is an individual whose business mailing address is c/o Box 94, Hohenwald, Tennessee 38462. (ANS. 1)

4. Respondent Reeves is, and at all times material herein was:
   (a) A stockholder in, and president of, the corporate respondent; and
   (b) Responsible for the direction, management and control of the corporate respondent. (ANS. 1)

B. Custodial Account

1. On March 18, 1985, and thereafter, Ms. Wilma Lenzen, a marketing specialist assigned to the Memphis Regional Office of the Packers and Stockyards Administration (P&SA), conducted an audit of the Murfreesboro Livestock Market, Inc., stockyard's records, including the records of the stockyard's "Custodial Account for Shipper's Proceeds" (custodial account), along with the records of the stockyard's principal, Mr. Carlton Reeves. (TR 21)

2. As of October 22, 1984, respondent Murfreesboro Livestock Market, Inc. (corporate respondent), had outstanding checks drawn on its custodial account in the amount of $149,817.53 and an overdraft in its custodial bank account of $15,785.41, and had, to offset those amounts, proceeds receivable in the amount of $59,033.53, resulting in a deficiency of $106,569.41 in funds available to pay shippers their proceeds. (ANS. 2; TR 27-31; CX 5, 6, 7, 8)

3. As of November 5, 1984, corporate respondent had outstanding checks drawn on its custodial account in the amount of $131,410.75, and had, to offset those amounts, cash in its custodial bank account in the amount of $24,651.20 and proceeds receivable in the amount of $76,466.44, resulting in a deficiency of $30,292.11 in funds available to pay shippers their proceeds. (ANS. 2; TR 31-32; CX 9, 10, 11, 12)

4. As of November 19, 1984, corporate respondent had outstanding checks drawn on its custodial bank account of $4,562.04, and had, to offset those amounts, proceeds receivable in the amount of $112,956.65, resulting in a deficiency of $46,913.80 in funds available to pay shippers their proceeds. (ANS. 2; TR 32-33; CX 13, 14, 15, 16)

C. Failure to Timely Deposit Funds in Custodial Account

1. On four separate occasions, respondent Reeves purchased livestock out of consignment from respondent Murfreesboro Livestock Market, Inc., and failed

to pay the full amount of the purchase price to the stockyard (i.e., failed to timely deposit funds in the custodial account) for these specific purchases before the close of the next business day following the purchase. (ANS. 2; TR 34-45; CX 17, 18, 19, 20, 20A, 21) A tabulation of these transactions follows:

DATE OF PURCHASE	NO. HEAD	PURCHASED FROM	DATE PAYMENT DUE	DATE OF PAYMENT	AMOUNT
10/5/84	4	Murfreesboro Lvstk Market, Inc., (TR 34-37; CX 18)	10/6/84	10/17/84	$ 1,329.55
10/12/84	87	Murfreesboro Lvstk Market, Inc., (TR 38-40; CX 19)	10/13/84	10/19/84	15,862.09
10/19/84	204	Murfreesboro Lvstk Market, Inc., (TR 40-43; CX 20, 20A)	10/20/84	10/26/84	51,274.20
10/26/84	87	Murfreesboro Lvstk Market, Inc., (TR 43-44; CX 21)	10/27/84	11/2/84	20,962.86

2. The respondents maintained a line of credit with the Lewis County Bank of Hohenwald, Tennessee. This arrangement extended $150,000.00 of credit. This line of credit was not specifically limited to the custodial account. Further, it had a "demand" provision and a variety of "default" provisions for early termination of the note, all favoring the bank and at the bank's option. It was an insecure arrangement. (ANS. 1-3; Exhibits A and B (attached to Answer); TR 112-114, 117)

D. McGill Estate Cattle

1. In October of 1986, prior to the Murfreesboro stockyard sale of October 19, Carlton Reeves telephoned and spoke with Reverend Charles Myron Keith of Franklin, Tennessee. The purpose of the call was to solicit the consignment of cattle to Murfreesboro Livestock Market, Inc., from the estate of Jim McGill of Murfreesboro, Tennessee. Jim McGill was Reverend Keith's father-in-law. Jim McGill had recently died and left a small herd of cattle. (TR 196)

2. On October 18, 1984, Reverend Keith and Mr. William McGill, brother of the deceased, met with Carlton Reeves at the homestead of Jim McGill to discuss selling a portion of the inherited cattle through the Murfreesboro stockyard. Carlton Reeves told Reverend Keith and William McGill that the estate could get a better price on the better quality cattle if they were sold through his market rather than at a disbursal sale on the farm. (TR 197, 207)

3. After discussing it between themselves, Reverend Keith and William McGill agreed to consign the higher quality livestock, which Carlton Reeves would select from the estate's cattle, to the Murfreesboro market. (TR 197, 207-08)

4. After the discussion, William McGill and Carlton Reeves went into the pasture and selected the better cattle to consign to the Murfreesboro market. (TR 208)
5. On the afternoon of October 18, 1985, after the better cattle were selected by Carlton Reeves and William McGill, Carlton Reeves had the cattle loaded onto his truck to be taken to his market. William McGill witnessed the loading and made a record of his observations. (TR 208-09; CX 22) After the fourth and final load of cattle was herded into the truck, William McGill was given a receipt by an employee of Carlton Reeves. (TR 209-10; CX 23)
6. Twenty Charolais cows, one Black Angus bull and thirty-seven mostly Charolais yearling calves constituted all the cattle picked up by employees of Carlton Reeves on the afternoon of October 18. (TR 210; CX 22) An additional calf was picked up by emptoyees of Carlton Reeves the next day. (TR 193-94, 210; CX 22, 23) In all, a total of fifty-nine head of cattle were consigned to the respondents by the estate of Jim McGill. (TR 193-94, 210; CX 22, 23)
7. Approximately one week after the sale of October 19 at Murfreesboro Livestock Market, Inc., Reverend Keith received payment for the sale of fifty-eight head of livestock. One head of livestock was reported to have died in the holding pen prior to sale. (TR 51-54, 198-201; CX 26, 27)
8. The McGill consignment was the first group backtagged by respondents beginning at 5:30 a.m. the morning of October 19. The consignment was assigned backtag numbers 8052 through 8110. (TR 74-76, 169-70; CX 30, 33, pp. 1 and 2)
9. The respondents failed to pay the McGill estate for seven head of livestock consigned to respondents. Those livestock for which the McGill estate was unpaid were assigned backtag numbers 8058, 8073, 8076, 8080, 8086, 8104 and 8110. In lieu of paying the McGill estate for those seven backtags, the respondents paid the McGill estate the net amount received from the sale of seven other cattle which were not consigned by the McGill estate. These seven substituted cattle were identified by backtag numbers 8015, 8019, 8115, 8116, 8401, 8402 and 8543. (TR 97-98, 180-82; CX 30, 31, 33, 35)
10. In addition to the seven switched head of livestock, the McGill estate was not paid for the one head of livestock which was reported to have died in the pen. This head of livestock was identified by backtag number 8093. (TR 59-73; CX 26, p. 12, CX 29, p. 7) In fact, this head of livestock (8093) was sold through the auction market and was purchased by Tennessee Dressed Beef, a Nashville, Tennessee, meat packer. That animal was slaughtered at Tennessee Dressed Beef's facility in Nashville. (TR 59-73, 142-45; CX 31F)
11. On November 12, 1985, Wilma Lenzen and Merle Paulsen of the Packers and Stockyards Administration met with Carlton Reeves at the Murfreesboro Livestock Market, Inc., stockyard. They informed Carlton Reeves that it appeared that several of the McGill consignment had been switched with other cattle and that the one head reported dead had in fact been sold and slaughtered. (TR 65, 97-98, 180-81) Carlton Reeves admitted that livestock were switched for his benefit.
12. Respondents failed to pay the McGill estate for the one had falsely reported as dead, although it was sold for slaughter by respondents.

12(a). Respondents failed to pay the McGill estate for seven consigned cattle, albeit, they did pay the McGill estate for the seven substituted cattle.

E. Reeves' Failure to Disclose Purchases of Consigned Cattle Through Secret Agent Bidder

1. In December of 1983, Kendall Davidson of Murfreesboro, Tennessee, consigned sixty-eight cattle to the respondents for auction on December 9, 1983. (TR 221)
2. Respondent Carlton Reeves solicited David Simpson of McMinnville, Tennessee, to sit in the sale barn at respondents' December 9, 1983, sale, and bid for him (Carlton Reeves) on livestock consigned by Kendall Davidson. (TR 102, 232, 256-57) Reeves successfully purchased 55 of these consigned livestock through Simpson's bidding. (TR 102; CX 37)
3. Simpson did not pay for these cattle. (TR 232) Reeves took possession of the cattle (TR 233), and paid for them.
4. Respondents did not notify Kendall Davidson in any way that Carlton Reeves was the actual purchaser of the livestock bid on by David Simpson. Nor did respondents notify Davidson of Reeves' interest in and control of Murfreesboro Livestock Market, Inc. (TR 103; CX 37)

F. Prior Custodial Account Cease and Desist Order

1. On August 16, 1974, respondent Carlton Reeves entered into a consent decision with the Secretary of Agriculture whereby Carlton Reeves agreed to cease and desist from:

(a) Failing to deposit in his "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)) an amount equal to the proceeds receivable from the sale of consigned livestock; and

(b) Failing to maintain his "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42).33 Agric. Dec. 1077 (1974) (TR 110).

G. Additional Reported Custodial Account Violations

1. On January 2, 1980, respondent Carlton Reeves received a letter from the Regional Supervisor of the Memphis region of the P&SA informing Carlton Reeves that an investigation of his market agency activities had determined that certain custodial account practices he engaged in were in violation of the Act. The letter requested respondent Carlton Reeves to take corrective measures to bring his operations into compliance with the Act and regulations. (CX 3)

H. Notice of Revised Custodial Account Regulations

1. On September 16, 1982, a letter notifying Carlton Reeves of revisions in the custodial account regulations which had gone into effect was forwarded to respondent Reeves by the Memphis P&SA office. (CX 4)

II. Discussion and Conclusions

A. The Respondent Failed to Maintain and Use Properly Its Custodial Account in Violation of the Act and Regulations.

The evidence establishes that on three dates, the respondents had

shortages/deficiencies in their custodial account. As of October 22, 1984, the respondents had a shortage in their custodial account of $106,569.41 (TR 28-31; CX 5-8); as of November 5, 1984, $30,293.11 (TR 31, 34; CX 9-12); as of November 19, 1984, $46,913.80. (TR 31-34; CX 13-16)

The reason for these shortages is quite clear. The respondents deposited proceeds from the sale of consigned livestock into the general account rather than into the custodial account. (TR 111) In order to provide funds to cover outstanding custodial account checks, employees of the respondents would call the Lewis County Bank, where the accounts were located, on a daily basis and ascertain the amount of checks presented that day against the custodial account for payment. Respondents would then write a check for that amount on its general account transferring funds to its custodial account sufficient to cover outstanding custodial checks. (TR 111-12) This arrangement is not legally permissible.

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a Custodial Account for Shipper's Proceeds (9 CFR § 201.42(b)). Section 201.42(c) of the regulations (9 CFR § 201.42(c)) in effect at the time of the alleged violations gives detailed instructions on how to properly maintain a custodial account:

> (c) Deposits in custodial accounts. The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) *after livestock is sold* (1) the proceeds from the sale of livestock that have been collected, and (2) *an amount equal to the proceeds receivable from the sale of livestock that are due from* (i) the market agency, (ii) *any owner, officer or employee of the market agency,* and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency. (Emphasis added).(9 CFR § 201.42(c))

Clearly, the respondents' method of funding their custodial accour through their general account does not comply with the requirements of ! CFR § 201.42(c)). *In re Farmers Livestock Auction, Inc.*, 44 Agric. Dec. [slip opinion, pp. 4, 12, 14] (Nov. 14, 1985). Respondents maintained their custodial account in this manner even though the importance of proper maintenance of their custodial account was repeatedly emphasized to respondents.

A consent decision was issued against respondent Carlton Reeves in 1974 for custodial account violations. Under the terms of the decision, respondent Carlton Reeves was ordered, *inter alia,* to cease and desist from failing to properly maintain the custodial account. (TR 110) *See, In re Carlton B. Reeves,* 33 Agric. Dec. 1077 (1974).

It should also be noted that in September 1982, respondent Reeves was notified by the Packers and Stockyards Administration of the August 30, 1982,

changes in the custodial account regulations. (CX 4) Despite this, the respondents continued to deposit funds into the general account and to reimburse the custodial account for those deposits, and Carlton Reeves' own purchases, after the time set by the regulations. *In re Farmers Livestock* Auction, Inc., *supra,* at page 14 of the slip opinion.

The Secretary has consistently held, and the courts have sustained, that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 USC § § 208, 213(a)), as well as a violation of section 201.42 of the regulations (9 CFR § 201.42). *In re Arab Stock Yard,* Inc., 37 Agric. Dec. 293, 301-02, 310-11, *aff'd mem.,* 582 F.2d 39 (5th Cir. 1978); *In re Breckenridge Auction & Sales Co.,* 36 Agric. Dec. 1522 (1977); *In re Sechrist Sales Co.,* 36 Agric. Dec. 665, 666, 671-75 (1977); *In re Hardy,* 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller,* 33 Agric. Dec. 53, 60-62, *aff'd sub nom. Miller v. Butz,* 498 F.2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.,* 27 Agric. Dec. 596, 605-10 (1968); *In re Anderson,* 26 Agric. Dec. 615, 619-20 (1967); *In re Koenig,* 24 Agric. Dec. 1213, 1219-20 (1965); *In re Bowman, 23 Agric.* Dec. 1074, 1086-89 (1964), *aff'd sub nom. Bowman v. United States Department of Agriculture,* 363 F.2d 81 (5th Cir. 1966); *In re Bowman and Reynolds, 23 Agric. Dec. 1065, 1068-71 (1964); In re Daniels, 14* Agric. Dec. 903, 913-17 (1955), *aff'd sub nom. Daniels v. United States,* 242 F.2d 39 (7th Cir. 1957), *cert.* denied; 345 U.S. 939 (1957).

Further, the Secretary has determined time and again that a market agency's failure to make deposits to its custodial account in the manner and within the times prescribed in section 201.42 is an unfair and deceptive practice. "It is deceptive because shippers do not know that their money is being used to extend credit to buyers. It is unfair because it is using trust money for their own purposes (to extend credit to themselves and others)." *In re Hardy, supra,* at 1400.

Respondents affirmatively allege that they are not in violation of the law regarding the maintenance of their custodial account because they have a line of credit on their business operations.[3] (ANS. 1-2, and attachments) It is firmly established that the existence of a line of credit to a livestock auction market does not relieve it of its legal obligation to strictly maintain its custodial account. *In re Powell,* 41 Agric. Dec. 1354, 1360 (1982); *In re Arab Stock Yard, Inc.,* 37 Agric. Dec. 293, 301-02, 310 n.10, *aff'd mem.,* 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Co.,* 36 Agric. Dec. 665, 668, 670-75 (1977); *In re Hardy,* 33 Agric. dec. 1383, 1401-06 (1974); *In re Howell Sales Co.,* 39 Agric. Dec. 651, 654 (1980); *In re Elmer A. Kath,* 36 Agric. Dec. 1707, 1713 (1977); *In re Smithfield Livestock Market, Inc.,* 36 Agric. Dec. 1546, 1561-62 (1977); *In re Bowman,* 23 Agric. Dec. 1065, 1071 (1964); *In re Shannon,* 7 Agric. Dec. 951, 966-67 (1948).

A line of credit extended by a bank is often subject to summary termination by the bank for a variety of reasons, and is usually gone when consignors most need the protection.

In addition, federal deposit insurance protection is not afforded to *each*

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[3] It should be noted that respondents' line of credit applies to their business in general and is not specifically limited to the custodial account. (ANS. attachments; TR 117)

consignor (up to the $100,000 limit) when the consignor's money is held in respondent's general account, instead of the custodial account. *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 673-75 (1977); *In re Hardy, 33 Agric.* Dec. 1383, 1400-01 (1974).

Finally, funds in the general account are at risk to general creditors of respondent; whereas funds properly in the custodial account are not.

Respondents' abuse of its custodial account constitutes a willful violation of the Act (7 USC § § 208, 213(a)) and of the regulations (9 CFR § 201.42).

The definition of willfulness is well settled. A violation is *willful* for administrative law purposes if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Townsend v. United States,* 95 F.2d 352, 357-58 (CA DC 1938), *cert. denied,* 303 U.S. 664 (1938); *Goodman v. Benson,* 286 F.2d 896, 900 (CA 7 1961); *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185 (1973); *Silverman v. CFTC,* 549 F.2d 28, 31 (CA 7 1977); *American Fruit Purveyors, Inc. v. United States,* 630 F.2d 370, 374 (CA 5 1980), *cert. denied,* 450 U.S. 997 (1981); *In re Shatkin,* 34 Agric. Dec. 296 (1975).

B. Respondent Carlton Reeves Failed to Pay, When Due, for Purchases Out of Consignment.

On four occasions, respondent Carlton Reeves failed to pay for livestock he purchased out of consignment at his stockyard by the close of the next business day as required by section 409 of the Act (7 USC § 228b).[4] At the sale of October 5, 1984, Carlton Reeves purchased four head of livestock out of consignment at his stockyard. He failed to pay the market for those purchases until October 17, 1984. (TR 34-37, 119; CX 18) On October 12, 1984, Carlton Reeves purchased eighty-seven head of livestock out of consignment at his stockyard. He failed to pay the market for those purchases until October 19, 1984. (TR 38-40, 119; CX 19) On October 19, 1984, Carlton Reeves purchased two hundred four head of livestock out of consignment at his stockyard. He failed to pay the market for these purchases until October 26, 1984. (TR 40-43, 119; CX 20, 20A) On October 26, 1984, Carlton Reeves purchased eighty-seven head of livestock out of consignment at his stockyards. He failed to pay for these purchases until November 2, 1984. (TR 35, 43-44, 119; CX 21) Respondents failed to reimburse the market's custodial account until respondent Reeves' payment.[5]

Respondent Reeves' failure to deposit an amount equal to the proceeds receivable from his own purchases to the respondents' custodial account is a clear violation of section 312(a) of the Act (7 USC § 213(a)). *In re Smithfield Livestock Market, Inc.,* 36 Agric. Dec. 1546, 1560 (1977).

This action amounted to an extension of credit which helped finance respondent Reeves' private livestock transactions. Respondents, rather than

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[4] The sale day of the market was on Friday. The next business day was Saturday. (TR 122)

[5] These transactions contributed to the custodial shortages described in section A, *supra.*

faithfully carrying out their fiduciary duties to their shippers, advanced the monetary interests of respondent Reeves and endangered the funds available in the custodial account to cover outstanding checks. Respondents' actions in financing respondent Reeves' personal livestock transactions in this manner was an unjust, unreasonable, unfair and deceptive practice in violation of section 312(a) of the Act (7 U.S.C. § 213(a)). *In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546, 1560 (1977); *In re Hardy*, 33 Agric. Dec. 1383 (1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596 (1968).

C. Respondents Switched Consigned Cattle (with other cattle) and Falsely Reported One Consigned Head as Dead, and Failed to Pay Consignor.

It is clear from the documentary evidence and testimony contained in the record that the respondents wilfully took seven head of cattle from the October 1984, consignment of the estate of the late Jim McGill and switched the cattle with other cattle, thereby causing the McGill estate to be paid the net sales price of cattle which they did not consign and failing to pay the McGill estate for cattle they did consign.

Complainant has carefully traced the cattle through various records and the evidence persuasively establishes the switching of the cattle, and the false reporting and failure to pay for the one dead head.

Respondents' explanations that they were merely paperwork mistakes was not persuasive nor credible.

This constitutes a clear breach of a fiduciary duty respondents owed to the consignors of cattle, as well as a fraud on the consignors. It also shows (at least in this instance) a specific monetary loss to consignor.

It is unfair and deceptive and constitutes a violation of section 312(a) of the Act (7 USC 213(a)).

D. Respondents Failed to Disclose to the Consignor that Carlton Reeves Purchased Consigned Livestock for Speculation.

The record clearly establishes that Kendall Davidson, Murfreesboro, Tennessee, consigned 68 head of livestock to respondents for the December 9, 1983, sale. (TR 102, 224-26; CX 37) Those cattle were sold at auction, with fifty-five of them being purchased by Carlton Reeves through bidding by an undisclosed agent. (TR 102-03, 232-33)

Respondents failed to disclose this fact to Kendall Davidson, and specifically failed to disclose it on the accounts of sale as required by 9 CFR § 201.56.

Failing to make disclosure of the purchases of the principal owner of a market out of consignment is an unfair and deceptive trade practice, and violates section 312(a) of the Act (7 USC § 213(a)). There is inherent unfairness for an agent selling on commission to secretly purchase for speculation. It is deceptive to show as buyer of the cattle, a person who did not buy the cattle but only bid on them for the buyer.

The whole purpose of section 201.56 is to provide timely and adequate information to the consignor so that if questions exist or disputes arise the consignor can swiftly and effectively protect his rights. (TR 329-330) Clearly the false information was a detriment to the consignor in finding out what happened concerning his cattle.

G. Further Evaluation.

The investigation was carefully and professionally carried out with detailed documentation in support of each point. Testimony presented by complainant's witnesses was clear, plausible and persuasive.

The evidence presented by complainant clearly preponderated over respondents. There were difficulties with credibility of some of respondents' evidence, and other evidence presented by respondents did not meet or address the key issues. Respondents' evidence was self-justifying and did not at any point come to grips with complainant's allegations.

The evidence presented by complainant establishes not only the violations alleged, but certain aggravating factors. Respondent, Carlton Reeves, has persisted over many years in abusing the custodial account. He has violated a cease and desist order and has ignored another warning concerning reported violations.

Further, the evidence strongly indicates that switching cattle was an intentional action and not the result of accident or mistake. Further, the evidence also shows that falsely reporting one head dead, when it was in fact sold for slaughter, was intentional and deliberate and not the result of mistakes or errors.

The failure to disclose the real purchaser of Kendall Davidson's cattle was also intentional and deliberate for the very purpose of making any inquiries by Mr. Davidson difficult or impossible to pursue. This purpose was fulfilled here.

Complainant seeks a cease and desist order, a suspension of one (1) year and a $10,000.00 joint and several civil penalty against both respondents.

Under the USDA sanction precedents, these recommended sanctions are appropriate. Granted, any economic loss from cattle-switching here is speculative, but it seems reasonable to infer *some* economic benefit to respondents even though the evidence does not show it. The breach of fiduciary duties is well established, and that is an industry injury of significance which warrants a penalty.

Secret purchases of consigned cattle by officers of respondent is another breach of fiduciary duties owed to the consignors and the industry[6] which merits a sanction without establishing an economic loss sustained by the particular consignor. Here the consignor, dissatisfied with the sale, was frustrated in his attempts to trace his cattle. (TR 231-234)

Falsely reporting the death of consigned livestock, and then selling it for slaughter, without paying the consignor, has some clear economic loss to the consignor, as well as being a serious breach of trust.

Deliberately failing to maintain a custodial account is a serious breach of duty directly undermining the regulatory safety net designed to minimize (if not eliminate) losses to cattlemen from the financial collapse of packers, stockyards, auction markets and dealers. See, for example, *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 550 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (CA 8 1978).

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[6] Competitive advantages may be theorized to exist over other cattle dealers.

These violations go to the very essence of a market agency responsibilities. Also, violation of a prior cease and desist order requirin care for consignor's money by prompt deposit in the custodial account, an ignoring a later auditor's report of custodial account violations, shows a cras indifference to legal duties.

It is the policy of the Secretary, in disciplinary proceedings under th Packers and Stockyards Act, to impose severe sanctions where seriou violations have been shown. *In re Miller*, 33 Agric. Dec. 53, 71, *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). This is both to deter the respondents and to serve as an effective deterrent to others.

Complainant argues that only a severe suspension period will serve to satisfactorily deter others; and says that complainant is "not able to routinely audit every market agency. . . . The agency must rely on sanctions imposed in disciplinary proceedings to help effect voluntary compliance with the Act by respondent and others." Page 32, Comp's opening brief.

However, valid the view that deterrence is without value if the risk of being caught is minimal, this is the well established law of the USDA precedents. *In re Richard N. Garver*, 45 Agric. Dec. ___ (1986) (slip opinion pages 12-21), *appeal docketed*, No. 86-4081 (6th Cir. Nov. 28, 1986); *In re Doug Welch, et al. (decision as to Michael Benson)*, 45 Agric. Dec. ___ (1986) (slip opinion p. 29); see also, *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ___ (1986) ($25,000 civil penalty assessed by the ALJ increased on appeal to $50,000), *remanded*, No. 86-7332 (9th Cir. June 29, 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. ___ (1986) ($25,000 penalty increased to $50,000 on appeal).

Respondents have wilfully violated sections 307, 312(a) and 409 of the Act (7 USC §§ 208, 213(a), 228b) and sections 201.42 and 201.57 of the regulations (9 CFR §§ 201.42, 201.57).

Precedents require that great weight be given to the recommendations of the complainant. *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1567 (1974). *In re Sy B. Gaiber and Co.*, 31 Agric. Dec. 843, 845-51 (1972); *In re J.A. Speight*, 33 Agric. Dec. 280, 317-18 (1974); *In re Esposito*, 38 Agric. Dec. 613, 652-56 (1979). The recommended sanction is adopted.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents on appeal do not challenge the $10,000 civil penalty or the evidentiary support for the ALJ's findings of fact. However, they contend that the 1-year suspension is excessive and unreasonable, and should be reduced to a 2-week suspension.

Even though respondents do not challenge the evidentiary support for the ALJ's findings of fact, it is worth noting that the Department's two investigators (Merle E. Paulsen, Chief, Financial Protection Branch, P&SA, and Wilma Lenzen, Marketing Specialist, P&SA) testified that respondent Reeves admitted to them that his wife had switched the McGill estate cattle for respondents' benefit (Tr. 97-98, 180-81). Mr. Reeves told the investigators, however, that he would deny having made that statement (Tr. 181), which he did at the hearing (Tr. 263-68). Specifically, Mr. Paulsen testified (Tr. 180-81):

Q. And did Mr. Reeves offer any explanation for your findings?

A. We discussed information contained on Exhibit 33 and 35. And at the end of my analysis of the information on Exhibit 35, Mr. Reeves asked what I thought the records indicate. And I told him that I thought it would indicate that the livestock were switched. And he agreed with me.

And I asked if he had switched the livestock; and his answer was no. And I asked if he knew who switched the livestock in his records; and he indicated that he did. I asked if it was an employee; and his answer was yes.

I asked if it was done for his benefit; and his answer was yes. And I asked if he could identify that person; and he identified his wife as the one who would have switched the records.

Q. Did he say anything else?

A. Yes. He offered as an explanation that she was money hungry and that she was crazy.

Q. And did he make any further comment about that?

A. Yes. He said that if I made known the statement that he had made, that he would deny that he had made that statement.

Similarly, Ms. Lenzen testified (Tr. 97-98):

Q. What I'm asking is, did you inform him [Mr. Carlton Reeves] of the discrepancies you found in the back tag sequence and what you thought they indicated; ask him why Reverend Keith was not paid for those animals?

A. I was present when he was asked those questions.

Q. Who else was present at that time?

A. Merle Paulsen.

Q. Okay. And how did Mr. Reeves respond?

A. He looked at the records. Mr. Paulsen explained the records to him. And Mr. Reeves simply said that it was obvious that the livestock had been switched, and he said it had been done for his benefit.

MR. RUCKER: For whose benefit?

THE WITNESS: For Carlton's benefit, for his benefit. But he said as owner of the market, he had to accept the responsibility.

Mr. Reeves was asked who this person was who actually did this switching. And he said he had not done it. We asked who had done it. And he said that his wife had done the switching. And then he said she was crazy and money-hungry and a workaholic, and that she needed to be out of the market.

The ALJ, who saw and heard the witnesses testify, believed the testimony of complainant's investigators as to respondent Reeves' admission, rather than respondent Reeves' denial. There is no basis for differing with the ALJ, in this respect. In addition, it is noteworthy that respondents did not call Mrs. Reeves, who is a co-owner of the market with her husband (Tr. 244), as a witness to rebut that damaging testimony. Under the settled principle that has been followed in many proceedings before this Department,[7] and which has

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[7] *E.g., In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric. Dec. ____ (Feb. 27, 1986); *In re Grody*, 45 Agric. Dec. ____ (continued...)

also been followed in many judicial proceedings,[8] I infer that her testimony would have been adverse to respondents' interests here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer,* Cowp. 66, quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

For the foregoing reasons, and for the reasons set forth by the ALJ, the sanction as to the McGill estate cattle, as well as the sanction as to the other violations, is based on deliberate violations, rather than "paperwork errors or careless, but innocent-hearted mistakes or misunderstanding" (Initial Decision at 3).

As to the custodial account violations, respondents contend that there was, in fact, no failure to pay any consignor for livestock. But it is the duty of the Packers and Stockyards Administration to prevent potential injury by stopping unlawful practices in their incipiency.[9] If the custodial account violations had,

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[7] (...continued)
(Jan. 31, 1986); *In re Haring Meats and Delicatessen, Inc.,* 44 Agric. Dec. ____ (Oct. 17, 1985); *In re Saylor,* 44 Agric. Dec. 2238 (1985) (decision on remand); *In re Petty,* 43 Agric. Dec. 1406 (1984), *appeal docketed,* No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc,* 42 Agric. Dec. 1505 (1983); *In re Farrow,* 42 Agric. Dec. 1397 (1983), *aff'd* in part and rev'd in part, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.,* 42 Agric. Dec. 81, 101-02, *aff'd,* 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper,* 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd,* 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.,* 41 Agric. Dec. 388, 402-03 (1982), *aff'd,* No. 82-1157 (D.N.J. Jan 24, 1983), *aff'd mem.,* 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.,* 40 Agric. Dec. 1468, 1507 (1981), *aff'd,* No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded,* No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand,* 42 Agric. Dec. 726 (1983), *aff'd,* No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd,* 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Packing Co.,* 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd,* No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis,* 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox,* 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.,* 37 Agric. Dec. 570, 586-87 (1977), *aff'd,* 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied,* 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.,* 37 Agric. Dec. 293, 305, *aff'd mem.,* 582 F.2d 39 (5th Cir. 1978); *In re Burrus,* 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam,* 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.,* 39 Agric. Dec. 607, 637-38 (1977), *aff'd,* 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied,* 449 U.S. 1061 (1980); *In re Loretz,* 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.,* 35 Agric. Dec. 1552, 1558 (1976), *aff'd* per curiam, 558 F.2d 748 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978); *In re Whaley,* 35 Agric. Dec. 1519, 1522 (1976); *In re Casca,* 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley,* 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.,* 33 Agric. Dec. 499, 514 (1974), *aff'd* per curiam, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight,* 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.,* 31 Agric. Dec. 474, 499 (1972).

[8] 2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States v. Di RE,* 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States,* 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge,* 160 U.S. 379, 383 (1896); *Karavos Compania, Etc. v. Atlantica Export Corporation,* 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union v. NLRB,* 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co. v. Wentz,* 352 F.2d 592, 597 (8th Cir. 1965); *Cramling v. Pittsburgh & Lake Erie R.R. Co,* 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. CIR,* 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. Staples,* 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.,* 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles v. Lentin,* 151 F.2d 615, 619 (7th Cir.), *cert. denied,* 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff,* 108 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB v Remington Rand, Inc.,* 94 F.2d 862, 867-68 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938).

[9] *Daniels v. United States,* 242 F.2d 39, 41-42 (7th Cir.), *cert. denied,* 354 U.S. 939 (1957); *In re Corn State Meat Co.,* 45 Agric. Dec. ____ (May 8, 1986) (dicta); *In re Powell,* 41 Agric. Dec. 1354, 1360 (1982); *In re Sechrist Sales Co.,* 36 Agric. Dec. 665, 675 (1977); *In re Miller,* 33 Agric. (continued...)

in fact, resulted in failures to pay for livestock, there would, of course, have been additional violations, perhaps warranting a 5-year suspension (see e.g., *In re Garver*, 45 Agric. Dec. ____ (June 19, 1986), *appeal docketed*, No. 86-4081 (6th Cir. Nov. 28, 1986).

Respondents also contend that the sanction in this case should be reduced because, subsequent to the hearing in this case, a Tennessee Circuit Court jury awarded Kendall Davidson a judgment against respondents for the value of his livestock upon which he had previously refused payment, plus $125,000 in punitive damages, and a claim by the McGill estate is still pending (Respondents' Reply Brief at 9, note 1). However, punitive damages imposed in civil proceedings against respondents do not constitute mitigating circumstances in this administrative, disciplinary proceeding. If they were to be considered at all (which they are not), they would be more aggravating in nature than mitigating, since they show that a jury of respondents' peers considered one aspect of respondents' violations in this case to be so outrageous as to warrant $125,000 in punitive damages.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g., In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987), which is set forth as an appendix to this decision.[10]

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g., In*

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[9] (...continued)
Dec. 53, 62, *aff'd* per curiam, 498 F.2d 1088 (5th Cir. 1974); *In re Bowman*, 23 Agric. Dec. 1065, 1071 (1964); and *see Bowmnn v. USDA*, 363 F.2d 81, 85-86 (5th Cir. 1966).

[10] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in In re Blackfoot Livestock Comm'n Co., 45 Agric. Dec. ____ (Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Callier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd* per curiam, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd* sub nom. *Vnn Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cardele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd* per curiam, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed* in 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd* per curiam, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd* per curiam, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tngash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd* per curiam, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd* per curiam, 498 F.2d 1088, 1089 (5th Cir. 1974).

re Parchman, 46 Agric. Dec. ____ (May 28, 1987) (90-day suspensioo and $10,000 civil penalty for weighing violations), *appeal docketed,* No. 87-3701 (6th Cir. July 23, 1987); *In re Rotches Pork Packers, Inc.,* 46 Agric. Dec. ____ (Apr. 13, 1987) ($50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Comm'n Co.,* 46 Agric. Dec. ____ (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty for increasing prices aod weights in commission purchases), *appeol docketed,* No. 87-7189 (9tb Cir. Apr. 27, 1987); *In re Welch,* 45 Agric. Dec. ____ (Sept. 25, 1986) (decision as to Beoson) ($10,000 civil penalty and 1-year prohibitioo from engaging in business subject to the Act for fraud by an auctioo market employee); *In re Garver,* 45 Agric. Dec. ____ (June 19, 1986) (2-year suspeosioo for failing to pay for livestock), *appeal docketed,* No. 86-4081 (6th Cir. Nov. 28, 1986); *In re Holiday Food Services, Inc.,* 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty for commercial bribery), *remanded,* No. 86-7332 (9th Cir. June 29, 1987); *In re Corn State Meat Co.,* 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Comm'n Co.,* 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension for custodial accouot and check-kiting violations), *aff'd,* 810 F.2d 916 (9th Cir. 1987); *In re Fanners & Ranchers Livestock Auction, Inc.,* 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respoodent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor,* 44 Agric. Dec. 2238 (1985) (decisioo oo remaod) (8-month suspension and $10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.,* 44 Agric. Dec. ____ (Mar. 18, 1985), *final consent decision,* 44 Agric. Dec. ____ (Oct. 24, 1985) ($10,000 civil penalty for discriminatory promotional allowances); *In re Powell,* 44 Agric. Dec. ____ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied,* 44 Agric. Dec. ____ (May 28, 1985) (appeal not timely filed); *In re Mid-West Veal Distributors,* 43 Agric. Dec. 1124 (1984) ($77,000 civil penalty, with $27,000 suspended, for payment, bond and trust violations); *In re Mayer,* 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed,* No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman,* 42 Agric. Dec. 1848 (1983) ($20,000 civil penalty for bait-and-switch advertising aod deceptive practices), *aff'd,* 770 F.2d 888 (10th Cir. 1985).

In *In re Garver, supra,* 45 Agric. Dec. ____, slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30-to-60-day suspension orders would have been issued in comparable cases a few years ago.

For the foregoing reasons, the following order should be issued.

Order

Respondeots Murfreesboro Livestock Market, Inc., and Carlton Reeves, their agents aod employees, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42);

3. Failing to pay, when due, the full purchase price of livestock;

4. Failing to sell livestock consigned to the market for the benefit of the consignors of that livestock;

5. Failing to remit the proceeds from the sale of consigned livestock to the consignors of that livestock;

6. Converting consigned livestock to their own use, substituting other livestock for the converted livestock, and paying the consignors on the basis of the sale price of the substituted livestock;

7. Representing to consignors that consigned livestock had died and said consignors would not be paid for such livestock, when in fact, the livestock was sold through the market and the proceeds from the sale of such livestock were converted to the use of the market, its owners, officers, agents or employees; and

8. Failing to disclose an ownership or financial interest in the market on accounts of sale issued to consignors when the market or other individuals designated in section 201.56 of the regulations purchases livestock out of consignment at the Murfreesboro Livestock Market, Inc.

Respondent Murfreesboro Livestock Market. Inc., is suspended as a registrant subject to the Act for a period of 1 year and thereafter until the shortages in its custodial account are corrected. After the expiration of the 1-year period, if the custodial shortages are eliminated, a supplemental order will be issued in this proceeding terminating the suspension.

Respondent Carlton Reeves is prohibited from operating subject to the Act for a period of 1 year.

Respondents are jointly and severally assessed a civil penalty in the amount of $10,000. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondents.

The cease and desist and recordkeeping provisions of this order shall become effective on the day after service of this order. The suspension and prohibition provisions shall become effective on the 30th day after service of this order.

APPENDIX

Excerpt from *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ___, slip op. at 213-51 (Mar. 19, 1987), *appeal docketed,* No. 87-7189 (9th Cir. Apr. 27, 1987).

U.S.D.A. Sanction Policy

[Excerpt omitted.--Editor.]

In re: CHARLES NORTH, a.k.a. ROBERT NORTH.
P. & S. Docket No. 6764.
Supplemental Order filed August 31, 1987.

Sharlene W. Lassiter, for Complainant.
Respondent, pro se.
Supplemental Order issued by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On July 31, 9187, an order was issued in the above-captioned matter, which, *inter alia*, prohibited respondent from engaging in business subject to the Act for a period of one year provided that upon application to the Packers and Stockyards Administration a supplemental order may be issued upon demonstration by respondent that all the unpaid livestock sellers have been paid in full, and provided that the order shall be modified to permit respondent's salaried employed by another registrant after the expiration date of the 21 day period.

Respondent has demonstrated that all unpaid livestock sellers have been paid full. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued on July 31, 1987, is modified to permit respondent's salaried employment by another registrant as a pack buyer. The order shall remain in full force and effect in all other respects.

In re: SHOSHONE SALE YARD, INC.
P. & S. Docket No. 6729.
Supplemental Order filed August 28, 1987.
Roberta Swartzendruber, for Complainant.
Robert M. Cook, Norfolk Nebraska, for Respondent.
Supplemental Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On May 28, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of two weeks and thereafter until it demonstrates that the shortage in its Custodial Account for Shippers' Proceeds has been eliminated.

Complainant has now received information that the shortage in respondent's Custodial Account for Shippers' Proceeds has been eliminated. Accordingly,

IT HEREBY ORDERED that the suspension provision of the order issued May 28, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: LES ZEDRIC, d/b/a MONMOUTH LIVESTOCK SALES.
P&S Docket No. 6778.
Supplemental Order filed August 14, 1987.

Edward M. Sliverstein, for Complainant.
Barry M. Barash, Galesburg Illinois, for Respondent.
Supplemental Order issued by Victor W. Palmer, Acting Chiief Administrative Law Judge.

SUPPLEMENTAL ORDER

On June 10, 1987, an order was issued the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for 28 days and thereafter until he demonstrates that the dedicit in his "Custodial Account for Shippers' Procceds" has been eliminated.

Respondent has demonstrated that the deficit in his "Custodial Account for Shippers' Proceeds" has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 10, 1987, is terminated. The order shall remain in full force and effect in all other respects.

DANIEL ROHWER, v. GRANT HENKELVIG and LEON FARROW.
P&S Docket No. 6499.
Order of Dismissal filed August 11, 1987.

Complainant, Pro se.
Robert Malloy, Goldfield Iowa, for Respondent.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*) begun by a complaint received on September 12, 1984, alleging in substance sale of animals which became sick and died after delivery. The amount claimed was $5,700.00.

Copies of the complainant, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent Henkelvig on November 21, 1984, and on respondent Farrow on November 9. A copy of the investigation report was served on complainant on November 3. No answer received from respondent Henkelvig. A timely answer was received from respondent Farrow. A copy thereof was served on complainant on December 14. Complainant requested an oral hearing.

An oral hearing as requested was held on August 22, 1985 in Sioux City, Iowa before Steven Luparello of the Office of the General Counsel of this Department. Complainant appeared without counsel. Respondent Farrow was represented by Robert Malloy, Esq., Goldfield, Iowa. Only complainant and respondent Farrow testified. Two exhibits were received. A brief on behalf of respondent exhibits were received. A brief on behalf of respondent Farrow was received.

On Friday, June 29, 1984, complainant and respondent Henkelvig met for the first time at a sale barn in Spencer, Iowa, when they both bid on certain cattle Mr. Henkelvig brought them. Complainant testified (Tr. 8):

> So he [Henkelvig] says: If you'd be interested, why, I could pick you up cattle two or three dollars cheaper in the South. No, I haven't, I says, furthermore, I wouldn't want dust bowl cattle out of Texas and Oklahoma. He says, these will be just as good a cattle that we're looking at and what we bid on right here, even better, he says, better buying conditions. So I says, no, I'm not too wild about that. And he kept at me and he says: Well, you go ahead and try to buy cattle, and I'll see if I can get some brought and I'll give you a ring.

Thereafter, respondent Henkelvig phoned complainant and tried to sell him certain cattle not involved herein, without success.

On Tuesday, July 17, 1984, respondent Henkelvig phoned complainant again,said that he had some cattle brought in Springfield, Missouri, and gave an average weight and price per cwt. Complainant agreed to buy them. On questioning by Mr. Luparello, complainant testified (Tr. 32):

Q. How did Mr. Henkelvig represent the cattle to you? Did he ever say that these were healthy cattle?

A. When we were in the sale barn in Spencer, he told me they would be as good as or even better type of cattle than what we were bidding on against each other.

Q. Was this a general buying -- general buying situation that he promised, or was this a specific load of cattle that he promised them to be as good as or better than what you were bidding on?

A. Well, the way he stated it is that the cattle that I'll put on your place will be as good or better that the ones we are bidding on today.

Q. Did you ever speak specifically about this one head, this one load of 81 head?

A. No, I did not.

* * *

Q. So basically as to this 81 head, he never said anything?

A. No, huh-uh.

Respondent Henkelvig later phoned complainant and told him that delivery would be delayed. The following Monday, July 23, 1984, a total of 81 animals were delivered to complainant's farm near Lakefield, Minnesota. Complainant wanted the animals shipped directly from the sale barn where they were purchased to his farm without being unloaded, so that they would be thirsty enough to drink treated water upon arrival, and had told this to Mr. Henkelvig,bubt the latter told him at that time that they had been unloaded once in transit to fill the truck. Notwithstanding the delay in delivery, which any person of complainant's experience should know would greatly increase the danger of infection, and his knowledge that the animals had been unloaded in transit contrary to his instructions, complainant received from respondent Henkelvig a handwritten document headed "Farrow Grain & Livestock," and itemizing charges for the cattle. He gave Mr. Henkelvig a check payable to "Farrow Grain & Livestock" for the amount charged, $21,670.80. He had never heard of respondent Farrow before then and was told by Mr. Henkelvig that Mr. Farrow was his "money man."

Complainant's check was forwarded to respondent Farrow and deposited the latter's bank account. The seller to respondent Henkelvig later contracted Mr. Farrow about payment and the letter paid that person the amount he charged.

Beginning shortly after delivery of the animals to complainant's farm, many of them got sick and 15 died.

If we understand complainant's contention correctly, he would base liability of the respondents on the fact that some of the animals got sick and died shortly after delivery, and must have been incubating an infection when delivered. A seller of animals is not made liable by this without something more such as fraud, misrepresentation, concealment, or breach of warranty. See *Verschoor v. Sanders,* 36 Ag. Dec. 117 (1978), in which we held:

If a buyer has a right to reject animals by comminicating to the seller a prompt, clear, and uneuivocal notice that he rejects them. Rejection of animals does not require any inhumane act toward them, nor does it preclude reasonable care and humane treatment of them. 37 Ag. at 118

The record contains nothing, allegation or testimony, relating to warranty. In the complaint letter, the only allegation relating to representation is as follows:

My complaint involves excessive death loss and definitely misrepresentation as cattle were incubating pasturella hemolytica * * * at the arrival date of July 23, 1984.

In the complaint pprinted form, in the space for statement of facts, the allegations are entirely as follows:

The defendants sold me 81 head of cattle which were delivered on July 23, 1984. The cattle were represented as good and healthy. They really had pasturella hemolytica and showed symptoms within 24 hours of delivery. The failure of respondent Henkelvig to file an answer consttutes an admission of the allegations of the complaint and a consent to issuance of a final order based on all evidence in the record.

As shown above, the complaint letter and form allege misrepresentation. Howerever, also shown above, complainant's testimony clearly shows that there was on representation, true or false, relating to the 81 animals in quetsion.

Another defense was raised by Farrow which need not be considered in view of the result reached.

This order is the same as an order issued by the Secratary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, as authority by Act of April 4, 1940, 54 Stat. 81, 7 U>S>C> 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1982 Ed., App. pg. 1068.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 C.F.R. § 202.117.

On a complainanat's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. I.C.C.*, 337 U.S. 426 (1948).

The complaint herein is hereby dismissed.

Copies hereof shall he served on the parties.

DISCLIPINARY DECISIONS

In re: ANGLEN PRODUCE, INC.
PACA Docket No. 2-7387.
Order filed August 17, 1987.

Eric Paul, for Complainant.
Theresa A. Campbell, Bakersfield, California, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

Order Denying Motion for Extension of Time

On July 10, 1987, respondent's newly-retained counsel requested an extension of time until August 31, 1987, to file an appeal of the Administrative Law Judge's decision filed April 21, 1987. However, inasmuch as respondent's original counsel of record was served with a copy of the decision and order on April 27, 1987 (return-receipt card attached), the decision and order became "final and effective...35 days after the date of service thereof" (7 C.F.R. § 1.142 (c)). The Judicial Officer has no jurisdiction to hear an appeal after it has become final and effective. *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1950 (1983). Copies of *Rinella's* and *Dock Case* are attached.

Accordingly, the following order is issued.

Order

Respondent's request for an extension of time within which to file an appeal is denied inasmuch as the initial decision issued by the Administrative Law Judge become final and effective before the request was made, and the Judicial Officer has no jurisdiction to hear an appeal.

In re: B.G. MARKETING COMPANY.
PACA Docket No. 2-7386.
Decision and Order filed July 24, 1987.

Thomas C. Heinz, for Complainant.
Roger Schlossberg, Hagerstown, Maryland, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER
Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on December 30, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 2, 1986, through April 17, 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from 28 sellers, 137 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $327,710.92.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complaint for the issuance of a Default Order, the following

Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, B.G. Marketing Company, is a corporation, whose address is P.O. Box 649, Hagerstown, Maryland.

2. Pursuant to the licensing provisions of the Act, license number 841284 was issued to respondent on May 22, 1984. This license was renewed annually, but terminated on May 22, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period January 2, 1986, through April 17, 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from 28 sellers, 137 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $327,710.92.

Conclusions

Respondent's failure to make full payment promptly with respect to the 137 transactions set forth in Finding an Facts No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499h), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final August 31, 1987.-Editor]

In re: SUPER SUDS.
PACA Docket No. 2-7376.
Decision and Order filed June 9, 1987.

Sharlene Lassiter, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the Act, instituted by a complaint filed on November 18, 1986, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May 17, 1985 through October 6, 1985,

respondent purchased, received and accepted, in interstate and foreign commerce, from sixteen (16) sellers, eighty-two (82) lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices of balances thereof in the total amount of $232,375.85.

A copy of the complaint was served upon respondent. The respondent filed an answer in which it admits to the violations alleged. Upon the motion of the complaint to dismiss items 8 through 13 and 73 through 82 of paragraph 5, and for the insurance of an order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Super Suds, Inc., is a Florida corporation, whose address is 3335 N. Edgewood Avenue, Jacksonville, Florida 32205.

2. Pursuant to the licensing of the Act, license number 850755 was to respondent on March 6, 1985, was renewed annually, but terminated on March 6, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 5 of the complaint, during the period May 17, 1985 through September 2, 1985, respondent purchased, received and accepted in interstate and foreign commerce, from fourteen (14) sellers, sixty-six (66) lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, now outstanding in the amount of $186,554.97.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (U.S.C. § 499b), for which the Order below is issued.

Order

Item 8 through 13 and 73 through 82 of paragraph 5 in the complaint are hereby dismissed.

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final on August 11, 1987.-Editer]

GAILIAN D. BAGLEY, JR., d/b/a BAGLEY PRODUCE COMPANY v. L & L BROKERAGE COMPANY.
PACA Docket No. 2-7091.
Decision and Order filed August 6, 1987.

Burden of Proof - Broker's duties.

Complaint failed to sustain its burden of proving that its contract with respondent was for respondent to act as a buyer, as the evidence shows that respondent acted as a broker. Further, complainant has not alleged, nor does the record show, any violation of respondent's broker's duties. Therefore, respondent not liable and the complaint is dismissed.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $999.49 in connection with the alleged sale of a truckload of watermelons to respondent, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs. Neither party submitted any additional evidence. Respondent filed a brief.

Findings of Fact

1. Complainant, Gailian D. Bagley, Jr., d/b/a Bagley Produce Company, is an individual whose address is P.O. Box 1319, Edinburg, Texas.

2. Respondent, L & L Brokerage Company, is a partnership whose address is 1072 Howard Street, Omaha, Nebraska. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately May 3, 1985, complainant sold to South Omaha Fruit Market Inc., Omaha, Nebraska, a truckload of grey watermelons consisting of 44,419 pounds, at $.105 per pound, delivered. The contract was made through respondent, acting as a broker. It was agreed that respondent would invoice the buyer, collect, and remit to complainant.

4. On May 4, 1985, respondent prepared a broker's memorandum of sale containing the contract terms set forth in Finding of Fact 3 and mailed the memorandum of sale to complainant and buyer.

5. On May 5, 1985, complainant shipped the watermelons in interstate commerce to buyer, where they arrived on approximately May 6, 1985. The buyer complained to respondent about condition problems, and respondent notified complainant on approximately May 6, 1985. Various negotiations took place involving complainant, respondent and the buyer.

6. On May 20, 1985, respondent prepared an invoice showing the buyer as South Omaha Fruit Market Inc., and stating that the sale was made "for the

account of complainant. Respondent sent a copy of this invoice to complainant, and on complainant's copy typed a note reflecting its negotiations with complainant, as follows in part:

> Lester/Sam this load that Consignee sold 200 ctns to Gamble here in Omaha who refused them account leaking and over ripe-so took them back to his warehouse, where they ascertained - yes there was problems - we phoned you reduce price to .10 ½ deld. - They don't know what they have lost in weight as yet and we are trying [sic] to get figures. I do know they dumped 15 ctns at Gambles as I was sent there to look. We give finals signs [sic] ascertained, and this is getting OLD.

7. Respondent received payment from South Omaha Fruit Market Inc., and on July 13, 1985, wrote a check to complainant for $3,577.25. On July 20, 1985, respondent wrote another check to complainant for $87.25 constituting respondent's brokerage. Complainant accepted both checks, totalling $3,664.50, as partial payment of the $4,663.99 which complainant alleges to be the contact price.

8. A formal complaint was filed on December 2, 1985, which was within nine months from when the alleged cause of action herein accrued.

Conclusions

Complainant alleges in its complaint that respondent is liable for a truckload of watermelons complainant claims to have sold to respondent. Respondent contends that its role in this transaction was that of a broker between complainant, the seller, and Omaha Fruit Market Inc., Omaha, Nebraska, the buyer. Respondent claims it was given the authority to invoice, collect and remit for complainant's account. Respondent asserts that it properly carried out its broker's duties by issuing a memorandum of sale, invoicing the buyer, fully informing the parties in the course of negotiations resulting from the buyer's complainant of condition problems, collecting $3,664.50 from the buyer, and remitting to complainant that entire sum, including the $87.25 it was entitled to retain as brokerage.

As the moving party herein, the burden is upon complainant to prove by a preponderance of the evidence the terms of the contract, respondent's breach of such contract, and any damages incurred as a result of the alleged breach. *New York Produce Trade Association, Inv., v. Sidney Sandler, Inc.*, 32 Agric. Dec 702 (1973). Based on the evidence in the record we must conclude that complainant has failed to sustain its burden of proving that its contract with respondent provided for respondent to purchase the truckload of watermelons, as the evidence shows that respondent was to act as a broker only. This evidence consists of respondent's memorandum of sale, which clearly sets forth its role as a broker (Finding of Fact 4), respondent's May 20, 1985, invoice to South Omaha Fruit Market Inc., stating thereon that the sale was made "for the account of" complainant, and respondent's note to complainant on that invoice, a copy of negotiations involving complainant, respondent, and Omaha Fruit Market Inc. (Finding of Fact 6). Complainant claims in an unsworn statement that it never received any documents indicating that respondent was the broker. However, complainant never

submitted a sworn statement that it did not received the memorandum of sale or a copy of the May 20, 1985, invoice containing respondent's note, although it had ample opportunity to do so. It is apparent that the preponderance of the evidence supports respondent's claim that it was a broker.

Complainant has not alleged that respondent violated any of its broker's duties, and no such violation is evident from the record. Respondent properly issued a memorandum of sale, attempted to obtain the contract price from the buyer, kept complainant informed throughout the transaction, and remitted to complainant the amount it did receive, including its brokerage, which it had a right to retain. We believe respondent performed its duties as a broker in a satisfactory manner.

In view of the absence of any breach by respondent, as has been clearly shown, the complaint is without merit and must be dismissed.

Order

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CAL/MEX DISTRIBUTORS, INC., v. TOM LANGE COMPANY, INC.
PACA Docket No. 2-6979.
Stay Order filed August 28, 1987.

STAY ORDER AND EXTENSION OF TIME FOR FILING PETITION TO REHEAR, REARGUE, AND RECONSIDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. 499a *et seq.*), an order was issued on July 27, 1987. By letter received in the Office of the Hearing Clerk on August 6, 1987, respondent has moved that the reparation order be stayed, and that it be granted an extension of time within which to submit a petition for reconsideration.

Accordingly, the order of July 27, 1987, is hereby stayed. Section 47.24(a) of the Rules of Practice under the Act (7 C.F.R. 47.24(a)) provides that a petition for rehearing or reargument of the proceeding, or for reconsideration of the order. While respondent did not file a petition to rehear, reargue, and reconsider within ten days after the service of the order, on the basis of its request for a stay of the reparation order filed within ten (10) days from its receipt of this order within which to file a petition for rehearing or reargument of the proceeding, or for reconsideration of the reparation order of July 27, 1987. That petition shall state specifically the matters claimed to have been erroneously decided and the alleged errors. The petition has no evidentiary value and therefore does not need to be verified.

Copies of this order shall be served upon the parties.

CAL-SHRED, INC., d/b/a, STRAWBERRY CITY SALES, v. GEORGE R. PAYTON, d/b/a, PAYTON PRODUCE.
PACA Docket No. 2-7067.
Stay Order filed August 13, 1987.

STAY ORDER AND EXTENSION OF TIME FOR FILING PETITION TO REHEAR, REARGUE, AND RECONSIDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. 499a *et seq.*). an order was issued on July 13, 1987. By mailgram received in the Office of the Hearing Clerk on July 27, 1987, complainant has moved that the reparation order be stayed, and that complainant be granted an extension of time within which to submit a petition for reconsideration.

Accordingly. the order of July 13, 1987, is hereby stayed. Section 47.25(a) of the Rules of Practice under the Act (7 C.F.R. 47.24(a)) provides that a petition for rehearing or reargument of the proceeding, or for reconsideration of the order, shall be filed within ten days after the date of the receipt of the order. While complainant did not file a petition to rehear, reargue, and reconsider within ten days after service of the order, on the basis of its request for a stay of the reparation order filed within the ten-day limit, complainant is hereby granted until August 24, 1987, within which to file a petition for rehearing or reargument of the proceeding, or for reconsiderationof the reparation order of July 13, 1987. That petition shall state specifically the matters claimed to have been erroneously decided and the alleged errors. The petition has no evidentiary therefore does not need to be varified.

Copies of this order shall be served upon the parties.

DERRICK RANCHES, INC., v. PURITY SUPREME, INC.
PACA Docket No. 2-7001.
Decision and Order filed August 14, 1987.

Timely and effective rejection - Basis for rejection - Resale for account of complainant.

Where complainant shipped a sized of cantaloupe not called for in the contract, respondent was entitled to reject the shipment. Once rejected, in the absence of instructions from the shipper, respondent properly arranged for the produce to be resold for complainant's account. In the absence of challenge, the amount remitted as the net proceeds was deemed personable.

Peter V. Train, Presiding Officer
Thomas R. Oliveri, Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complainant was filed in which complainant seeks a reparation award against respondent in the amount of $3,750.00, in connection with the sale of cantaloupes in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer asserting that it had agreed to purchase cantaloupes of a particular size and label from Rancho Sales, not complainant. Respondent's answer further asserted that the cantaloupes delivered were not of the label or size specified.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) applies. Pursuant to such procedure, the parties were given the opportunity to submit additional evidence in the form of verified statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a brief.

Findings of Fact

1. Complainant, Derrick Ranches, Inc., is a corporation whose post office address is P.O. Box 865, Holtville, California 92250.

2. Respondent, Purity Supreme, Inc., is a corporation whose business mailing address is 200 Boston Road, Tax Department, North Billerica, Massachusetts 01802. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about May 31, 1984, Armata Distributing Co., acting as a broker, negotiated a contract between respondent and Rancho Sales for the sale of cantaloupes, The broker's confirmation of sale, dated June 5, 1984, indicates that the contract called for 1050 cartons of size 18's Salico brand cantaloupes.

4. On or about June 1, 1984, complainant shipped 1050 cartons of cantaloupes to respondent. Of these cantaloupes, 970 cartons were size 18's and 80 cartons were size 23's. All the cantaloupes bore the label Delu.

5, The total invoice price for these cantaloupes, including cooling charges and thermometer, was $7,162.50, f.o.b.

6. The cantaloupes at destination met good delivery standards as evidenced by a federal inspection, but respondent rejected the goods because they were not of brand and size called for in the contract. Complainant refused to accept the rejection, and the cantaloupes were resold through a commission merchant, G.T. Rodes, Inc., for a net price of $7,612.50 after deduction of its commission and handling charges.

7. Respondent remitted the sum of $13,412.50 after deducting freight in the amount of amount of $4,200.00, which still in dispute.

8. An informal complaint was received on January 8, 1985, which was within nine months after the caused of action herein accrued. The formal omplaint was filed on August 12, 1985.

Conclusions

While the record is unclear as to whether Rancho Sales was properly acting as agent for complainant Derrick Ranches, it is unnecessary to resolve this question in view of the disposition of the other issues as set forth herein. The primary dispute among the parties herein is whether the contract herein specified that the cantaloupes were to be of the Salico brand. However, the broker's confirmation of sale which is entitled to great weight as the document of a disinterested party clearly lists Salico under the brand column. Additionally, the report of investigation contains a copy of a telegram from the broker to Rancho Packing dated June 5, 1984 protesting the shipment of Luette Farms cantaloupes rather than the Salico label of Rancho Packing. This telegram was sent prior to the cantaloupes being inspected. Therefore, we conclude that the contract did call for Salico brand cantaloupes.

Equally important, the contract clearly specified that 1050 cartons of size 18 cantaloupes were to be shipped. It is undisputed that the shipment contained 80 contained 80 cartons of size 23 cantaloupes.

Where the goods tendered fail in any respect to conform to the contract, the buyer is entitled to reject the shipment. Section 2-601 of the Uniform Commercial Code; *The Garin Company v. E.C. Mitchell,* 30 Agric. Dec. 1534 (1971). It must do so within a reasonable period of time, which is defined to be within eight hours within eight hours with respect to a shipment by truck (7 C.F.R. § 46.2(cc)(2). Respondent was, therefore, entitled to reject the shipment herein on either or both of two grounds, size and brand.

Whether there was an effective rejection is a question of fact to be determined by a consideration of all circumstances. Although there is no formal communication in the record in which respondent specifically states on June 5, 1984, that "I reject," the communication of such a rejection can be inferred based on the following facts. First, respondent was careful to obtain the shippers' agreement that unloading the produce, which normally is an act of acceptance, was for the purpose of an inspection only and would not be considered an act of acceptance. The only purpose for obtaining such an agreement would be to preserve respondent's option to reject the load. Second, while not of itself a rejection, the broker's protest as to the different shipper is evidence of respondent's intent to reject. Third, Exhibit 5f is a copy of a telegram sent at 5:33 p.m. on June 5, 1984, to Rancho Packing, informing them that the loud was being sold for its account by G.T. Rodes [sic] because of material breach of contract. The conclusion that respondent rejected the shipment and that the parties understood respondent's actions be a rejection is also supported by the fact that complainant has repeatedly started that it refused to accept the rejection because the goods met good delivery standards.

We conclude that respondent timely rejected the shipment, that it was entitled to do so, and that the complainant refused to accept the rejection. Under these circumstances, the buyer has a duty to follow any reasonable instructions received from the seller, and in the absence of such instructions to make reasonable efforts to sell them for the seller's account (UCC 2-603).

In the case herein, the seller obviously gave no instructions as to what to do with the cantaloupes. Respondent, therefore, placed them with a local

commission merchant, G.T. Rodes, for resale for complainant's account, ar promptly notified complainant of its action. Rodes remitted the sum \$7,612.50 after deduction of commission and expenses. Respondent deducte freight of \$4,200.00 and remitted the net proceeds of \$3,412.50. No challeng was made to the resale to the resale amount or the deductions, and therefor we hold that respondent made reasonable efforts to sell the cantaloupes o complainant's behalf. Therefore, the complainant should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

GENERAL HOBBY CORPORATION d/b/a HAMILTON PACKING COMPANY v. WHOLESALE PRODUCE SUPPLY, INC.
PACA Docket No. 2-7205.
Decision and Order filed August 19, 1987.

Burden of Proof - complainant - Burden of Proof - Respondent - Consignment - Counterclaim.

Where complainant fails to prove consignee violated a duty owed to it, but consignee proves deficit, respondent's counterclaim is granted.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks \$1,368.00, as reparatioo, from respondent in connection with one transaction, in interstate commerce, involving grapes, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint and filed an answer thereto denying any liability to the complainant with respect to the subject transaction. In addition, respondent filed a counterclaim against complainant in the amount of \$745.16.

As the amount in dispute did not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20)was followed. Under this procedure, the varified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. Also, the parties are given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement. Neither party filed a brief.

Findings of Fact

1. Complainant, General Hobby Corporation, is a corporation doing business as Hamilton Packing Company whose mailing address is P.O. Box 31,

Reedley, California 93654. At all material times, complainant was licensed under the Aet.

2. Respondent, Wholesale Produce Supply, Inc., is a corporation whose address is 752 Kasota Avenue, Minneapolis 55414. At all material times, respondent was licensed under the Act.

3. On or about August 15, 1985, in the interstate commerce, respondent purchased 240 23 pound cartons of Flame Seedless Table Grapes from complainant at an agreed price of $5.00 f.o.b. per carton ($1,200.00), plus 50¢ per earton for precooling ($120.00) and 20¢ per carton for pelletizing ($48.00), for a total agreed f.o.b. price of $1,368.00. Misty Mountain Trading Co., Tubac, Arizona, acted as the broker on the transaction. The grapes were shipped to respondent, and accepted upon arrival on August 19,1985, by respondent's customer, Roundy's United Food Div., Little Chute, Wisconsin. On that same date, the grapes were the subject of a federal inspection. On the inspection certificate issued subsequent to that inspection (No. G 037945), the temperature of the grapes was noted as follows: "In various lugs 40 to 42° F." The condition of the grapes was noted as follows:

> Berries are generally firm and firmly attached to capstems. Stems strong and well developed, mostly green color, some turning brown and pliable. Average 5% shattered berries . Serious damage by wet or leaking berries average 3%. Decay ranges from 1 t 7%, average 3% Gary Mold Rot mostly in early, some in advance stages.

4. After the inspection, rejected the grapes to respondent, and respondent rejected the grapes to complainant. The parties then agreed that respondent would handle the grapes for complainant's account. After it agreed to handle the grapes on consignment, respondent had the grapes hauled from Little Chute, Wisconsin, to its location in Minneapolis, Minnesota, at a cost of $240.00.

5. On August 22, 1985, respondent sold the grapes to Jerry's Produce, St. Paul, Minnesota for $9.50 per carton delivered ($2,280.00). They wer rejected because of their poor quality.

6. On September 3, 1985, the grapes were sold to Twin City Produce, fo $8.30 per carton delivered ($1,992.00), but were rejected because of thei condition.

7. On September 13, 1985, the grapes were federally inspected again The temperature of the grapes was on the certification issued thereafter (Nc G 192607) as follows: "fn various location 48° to 50° f." The condition of the grapes was reported as follows:

> Berries mostly firm, and generally firmly attached to capstems. Stems turning brown to brown and pliable. From 2 to 7%, average 5% shattered. From 4 to 30%, average 14% serious damage by wet and sticky berries from leaking juice of decayed berries. Prom 2 to 9%, average 5% serious damage by stem decay. Decay ranges from 4 to 30% average 18% Gray Mold Rot in various stages, mostly advanced and nested.

8. On September 19, 1985, the grapes were sold to Dale Patnord for $4.00 per carton delivered ($960.00), but the grapes were again rejected.

9. Each attempt to sell the grapes was reported to Misty Mountain Trading Co., the broker involved, by respondent, and the broker reported each attempt to sell the grapes to complainant.

10. On September 23, 1985, the grapes were turned over to a hog farmer (Mr. Jim Lunecford) to be used as feed for his hogs.

11. On or about September 24, 1985, respondent sent a bill to complainant for $745.16 with respect to the subject shipment.

12. On September 27, 1985, respondent sent an account of sales to complainant for the subject grapes as follows:

Dumped 240 Flame Seedless Grapes at $5.70 FOB	$1368.00
Freight on 240 lugs at $1.70 ea.	408.00
Federal Inspection Charge	33.41
Federal Inspection Charge	63.75
Hauling from Little Chute, WI to Minneapolis	240.00
TOTAL DEDUCTION	$2113.16
Less Invoice Amount	1368.00
AMOUNT OWING WHOLESALE PRODUCE SUPPLY CO.	$ 745.16

13. The formal complainant was filed on January 9, 1986, which was thin nine months after the cause of action herein accrued.

Conclusions

The complainant is seeking the full contract price for 240 cartons of maged grapes on the ground that the respondent, allegedly, violated some ity which it owed to the complainant. Complainant has the burden of roving, by a preponderance of the evidence, each of its allegations in the omplainant. *Villereal v. Killerman*, 25 Agric. Dec. 1399 (1966). Thus, complainant has the burden of proving that respondent breached a duty owed to it and that it was damaged by virtue of that breach. There is no dispute that the relationship between the parties was that of consignor/consignee. The duties owed to a consignor by a consignee are spelled out in the regulations issued pursuant to the Act. *See* 7 C.F.R. § 46.29(a). Insofar as those requirements are pertinent to this case, they provide that consignees: are required to exercise reasonable care and diligence in disposing of the roduce; may not use a third firm to sell the produce; are not authorized to ll the produce outside their market area; must keep complete and accurate cords; and must render a true and correct accounting. There is absolutely evidence in the record which supports complainant's allegation that the pondent violated any of these duties.[1] Even had respondents proven each

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[1] Complainant also claims that respondent had a duty to keep it personally informed as to progress of its sales. However, that is *not required* by the Department's regulations. In event, the broker informed the Department, during the course of its investigation, that the ondent had kept it informed as to the progress of respondent's attempts to sell the grapes (continued...)

of its other allegations, complainant has failed to show it was damaged in any way by these alleged violations.[2] Respondent has the burden of proving each allegation which it made in support of its counterclaim. *See Bushwick Comm'n Co.* v. *Maloney*, 18 Agric. Dec. 1029 (1959). Its claims, generally, are supported by its accounting to complainant, as well as evidence of its attempts to sell the damaged grapes. Complainant has not disputed any not of the charges made in the respondent's accounting. However, respondent is not entitled to reimbursement for the cost of the first federal inspection ($63.75) as it took place during the time when the original contract was in effect. *Lackenmaier Bros.* v. *Kaufman-Brown*, 19 Agric. Dec. 422, 426 (1960); *C. & G. Onion Company, Inc.* v. *Bushman's, Inc.*, 40 Agric. Dec. 117, 119 (1981). Respondent has proven the remainder of the amount claimed in its counterclaim, or $681.41. This amount represents the deficit incurred in respondent's handling of the subject grapes. As it is the contractual duty of a consignor to reimburse the consignee for any deficit incurred in disposing of the shipment, we must conclude that complainant is liable to respondent in full amount of $681.41. *Broekhuizen Produce* v. *Hayashida Farms*, 28 Agric.Dec. 1076 (1969). Complainant's failure to pay respondent this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Order

Within thirty days from the date of this order, complainant shall pay to respondent $681.41, as reparation, plus interest at the rate of 13% per annum from November 1, 1985, until paid.

Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC. v. SUNLIGHT TOMATO CO., INC.
PACA Docket No. 2-6976.
Decision and Order Issued August 6, 1987.

Contract price - Market news service reports - Weight of evidence.

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[1] (...continued)
the and that it, in turn, had reported the respondent's difficulty in moving the merchandise t complainant. Thus, even if the respondent had such a duty, as the complainant was *in fa* informed of the particulars, the fact that it heard that information from the broker rather tha from the respondent is irrelevant.

[2] Complainant also alleges that respondent dumped the grapes without first getting the complainant's permission to do so. The regulations, *see* 7 C.F.R. § 46.22, do not require that a consignee get such permission before dumping produce. All that is required is that he sho that the merchandise was without commercial value and that it was in fact dumped. T September 13, 1985, inspection certificate, along with the September 19, 1985, rejection fr its customer, and the receipt from the hog farmer, supports respondent's claim that it dump the grapes with full justification.

Parties that the only issue in dispute is the contract price, and that the price was to be the price at which the tomato market settled during the week of January 21 - 26, 1985. The Market News Service Reports prices, relied upon by complainant, are far more reliable evidence of the price than the unsubstantiated allegations of respondent's broker. Complainant's version of the version of the price is thus supported by a preponderance of the evidence and respondent is ordered to pay the difference between that price and the amount already remitted.

Andrew Y. Stanton, Presiding Officer.
Complainant, Pro se.
Frank V. Charles, Chelsea, Mass, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,480.00, later amended to $9,062.50, in connection with the sale of 1,600 cartons of tomatoes to respondent, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complainant was served upon respondent, who filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed$15,000.00, the shortened procedure provided in section 47-20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs. Complainant submitted an opening statement and respondent an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent, Sunlight Tomato Co., Inc., is a corporation whose address is 145 Market Street, Chelsea, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On January 19, 1985, complainant sold to respondent a truckload of 6 x 6 tomatoes, 85 percent or better U.S. number one, considering of 1,600 cartons, f.o.b. It was agreed that the tomatoes would be priced at whatever price the market settled during the week of January 21 through January 26, 1985, plus $.50

ner carton for freight to the gas house, $.15 per carton for pallets, and $22.50 or a temperature recorder. The contract was negotiated by Tom Banks, a lesman of complainant, and James E. Huber, of Julian Boyce and sociates, Imokalee, Florida, acting as a broker and representing spondent. No memorandum of sale issued.

4. Complainant shipped the tomatoes in interstate commerce to spondent on January 23, 1985, where they arrived and were accepted.

5. The Federal-State Market News Service Reports for Winter Park, lorida, shows no specific f.o.b. prices for 85 percent or better or better U.S.

number one 6 x 6 tomatoes shipped on January 21 and 22, 1985. It does show listings for such tomatoes shipped on January 23, 24, and 25, 1985, at $18.00 per carton. There are no reports issued for shipments on Saturday, January 26, 1985.

6. Respondent has paid complainant $20,800.00 for the 1,600 cartons of tomatoes, and complainant has accepted this sum as partial payment. Complainant has claimed in its amended complaint that the sales price was $29,942.50, which respondent acknowledges is $9,142.50 more than the amount paid by respondent. That only $9,062.50 was claimed in the amended complaint must have been due to a mathematical error. It will thus be assumed that $9,142.50 was intended to be claimed.

7. A formal complaint was filed on June 24, 1985, which was within nine months from when the cause of action herein accrued.

Conclusions

The parties agree that when the contract terms were negotiated between James Huber, representing respondent, and Tom Banks, representing complainant, on January 19, 1985, the price to be charged was left open, to be established when the market settled the following week, January 21 - 26, 1985. The parties also agree that the 1,600 cartons of 6 x 6 tomatoes were treated with gas until January 23, 1985, when they were shipped in interstate commerce to respondent, who accepted them. Respondent does not dispute the quality of the tomatoes shipped and has provided no proof that they failed to comply with the terms of the contract. Respondent's sole defense is tha the price at which the 6 x 6 tomatoes settled differed from that claimed l complainant.

Complainant claims that the price at which the 6 x 6 tomatoes settle during the week of January 21 - 26, was $18.00 per carton. This is based o the Federal State Market News Service Reports for Winter Park, Florida These listings show that there was no settled price until January 23, 24 an 25, 1985, where the price for 6 x 6 tomatoes is shown as $18.00 per carton (Finding of Fact 5). Respondent claims that these prices are not strong evidence, as the reports for January 23 and 24, 1985, indicate "some sales prices to be established later." However, the fact that the reports provided specific price quotations makes it clear that there were a sufficient number of sales prices agreed to that day to permit the acknowledgment of a generally prevailing price. Respondent's argument that the sales price settled at $14.00 per carton relies entirely on the unsubstantiated allegations of its broker, James Huber. Mr. Huber's belief that sales price for 6 x 6 tomatoes during the week of January 21 - 26, 1985, generally settled at $14.00 per carton ca be given little if any weight as evidence compared with the Market Ne Service Reports listings. It is clear that the preponderance of the eviden overwhelmingly supports complainant's position.

We, therefore, conclude that the agreed upon contract price for the 1,60 cartons of 6 x 6 tomatoes was $18.00 per carton, plus $.50 per carton for gas $.05 per carton for freight to the gas house, $.15 per carton for pallets, anc $22.50 for a temperature recorder, for a total contract price of $29,425.50, which is $9,142.50 less than the $20,800.00 paid by respondent. Although

complainant claims only $9,062.50 in its amended complaint, ev asserts that the amount it paid to complainant is $9,142 complainant's alleged contract price. It is thus assumed tha intended to claim $9,142.50. Complainant's damages will, adjudged to be $9,142.50. Respondent's failure to pay cor $9,142.50 is a violation of section 2 of the Act, for which rep be awarded, with interest.

Order

Within 30 days from the date of this order, respondent complainant, as reparation, $9,142.50, plus interest at the rate per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

INTERNATIONAL FRUIT & VEGETABLES, INC. v GROSSMAN, d/b/a JEROME BROKERAGE DISTRIBUTINC PACA Docket No. 2-7189.
Order on Reconsideration filed August 6, 1987.

Order on Reconsideration issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

A Decision and Order was issued on June 9, 1987, awardi with interest theron to complainant in the amount of $22,180.0 1987, respondent filed its "Petition for Reconsideration." Tl denied.

The Order of June 9, 1987, remains in effect except that espondent shall be made within 30 days from the date of this

Copies of this order shall be served on the parties.

KARL'S FARM v. ORGANIC FARMS, INC.
PACA Docket No. 2-7076.
Decision and Order issued August 14, 1987.

Evidence - Failure to prove verbal contract or specific quantities of produce - In - Loss of identity of product.

Complainant, pursuant to a verbal agreement, shipped respondent variou organically grown product. Respondent, after claiming that there were quality me of the produce, refused to take any further shipments. Complainant so e balance of the purchanse price for the produce shipped, and also the va maining in the field when respondent refused to take further shipments. I mplainant failed to show that the verbal contract committed respondent to t nount of produce, and that Federal inspections made by respondent of] oduce, and that did not show that the produce was poor quality because a e late and covered product which had lost its identity.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued August 14, 1987, by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complainant was filed in which complainant seeks an award of reparation against respondent in the amount of $22,646.80 in connection with the shipment in interstate commerce of various lots of mixed perishable produce and the alleged failure of respondent to take delivery of mixed produce in accord with a verbal contract.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a counterclaim for boxes furnished by respondent to complainant and for lost profits in connection with the commodities received from complainant, as well as for losses allegedly incurred in connection with marketing of some of the produet. The total amount of respondent's counterclaim was $4,031.62.

Complainant filed a reply to the counterclaim denying any liability thereunder.

Although the amount claimed in the formal complaint exceeds $15,000, the parties waived oral hearing and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this proceedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Complainant filed a brief.

Findings of Fact

1. Complainant, Karl Slatner, is an individual doing business as Karl's Farm, whose address is Route 2, Box 145, LaBelle, Florida. At the time of the transactions involved herein, complainant was not licensed under the Act.

2. Respondent, Organic Farms, Inc., is a corporation whose business address is 10714 Hanna Street, Beltsville, Maryland. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about the following dates, complainant sold to respondent and shipped from his farm in LaBelle, Florida, to respondent in Beltsville, Maryland, the following quantities of organically grown perishable commodities at the prices listed below on an f.o.b. basis:

DECEMBER 11, 1984

304 1 1/9 bu. Suntan Bell Peppers @ 9.50	$2,888.00
115 1 1/9 bu. Green Bell Peppers @ 9.50	1,092.50
	$3,980.50

DECEMBER 21, 1984

27 1 1/9 bu. Green Bell Peppers @ 9.50	$256.50
1 1 1/9 bu. Red Bell Peppers FREE	
20 boxes Pink 'Tempo' Tomatoes @ 10.00	200.00
2 boxes Fancy Zucchini Squash @ 6.25	12.50
	$469.00

DECEMBER 26, 1984

3 Zucchini @ 6.25	$18.75
8 Zucchini Fancy @ 6.25	50.00
9 Yellow Straightneck @ 6.25	56.25
9 Small Tomatoes @ 10.00	90.00
48 Medium Tomatoes @ 10.00	480.00
88 Large Tomatoes @ 10.00	880.00
17 Ripe Tomatoes @ 10.00	170.00
	$1,745.00

DECEMBER 28, 1984

56 Green Bell Peppers @ 9.50	$532.00
2 Red Bell Peppers @ 12.50	25.00
10 Small Tomatoes @ 10.00	100.00
28 Medium Tomatoes @ 10.00	280.00
54 Large Tomatoes @ 10.00	540.00
39 Ripe Tomatoes @ 10.00	390.00
	$1,1867.00

DECEMBER 29, 1984

101 Large Tomatoes @ 10.00	$1,010.00
81 Medium Tomatoes @ 10.00	810.00
28 Small Tomatoes @ 10.00	280.00
8 Yellow Straightneck Squash @ 6.25	50.00
19 Zucchini @ 6.25	118.00
	$2,268.75

JANUARY 2, 1985

90 Large Tomatoes @ 10.00	$900.00
142 Medium Tomatoes @ 10.00	1,420.00
62 Small Tomatoes @ 10.00	620.00
3 Yellow Straightneck Swash @ 6.25	18.75
15 Zucchini @ 6.25	93.75
	$3,052.50

JANUARY 3, 1985

40 Large Tomatoes @ 10.00	$400.00
48 Medium Tomatoes @ 10.00	480.00
38 Small Tomatoes @ 10.00	380.00
3 Large Zucchini @ 6.25	18.75
4 Medium Zucchini @ 6.25	25.00
3 Small Zucchini @ 6.25	18.75
	$1,322.50

JANUARY 8, 1985

77 Green Bell Peppers @ 9.50	$731.50
13 Red Bell Peppers @ 12.50	162.50
	894.00

4. Respondent accepted all of the produce listed in paragraph 3 and has paid complainant $6,867.45, which leaves a balance still due and owing, after deducting $175.00 for which complainant was reimbursed by the trucker in regard to the December 29, 1984, shipment and a $10.00 credit allowed by complainant in regard to the December 26, 1984, shipment of $8,546.80.

5. The formal complaint was filed on July 31, 1985, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant seeks to recover balances allegedly due from respondent in regard to various shipments of organically grown produce made between December 11, 1984, and January 8, 1985. Complainant also seeks to recover reparation based on the value of perishable produce remaining in his fields at the time when respondent stopped receiving shipments of produce from complainant. It is alleged by complainant that respondent's president, Joseph Dunsmore, visited complainant's farm on two occasions during the summer of 1984, and that complainant agreed at the time to grow organic produce for respondent. Complainant asserts that quantities of the various kinds of produce were agreed upon at that time, and that other particulars were also agreed upon. Respondent acknowledges that these meetings took place, and that there was an agreement reached between that parties for complainant to supply respondent with the various kinds of perishable organically grown produce, but respondent contends that no quantity agreements were reached. Neither party seems to dispute that price agreements were reached between them at this time, nor is there any dispute over the price amounts applicable to the various kinds of produce. Complainant asserts that he prepared proposed written contract and sent such contract to respondent. A copy this proposed contract was submitted in evidence by respondent and such does show specific acreage applicable to each type of commodity along the number of plants and that approximate projected yield for commodity. It is undisputed that respondent received this proposed con and returned it to complainant along with its own different proposed con

Respondent's proposed contract was not satisfactory to complainant complainant never signed such contract or returned it to respondent. Inst complainant prepared a third proposed contract which it never sen respondent. The proposed contract forwarded by respondent to complair does not specify quantities of produce. Under the circumstances, we unable to find that complainant has proven by a preponderance of evidence that it had a binding agreement with respondent under wh respondent would be required to take delivery of specific quantities produce. Accordingly, reparation cannot be awarded in complainant's fa for that portion of the complaint which requests reimbursement for dama in regard to produce left in the field at the time shipments to respondent w stopped.

A very different situation exists as to the remaining portion complainant's claim. The record clearly shows that the quantities of produ set forth in Finding of Fact 3 were shipped to and accepted by respondc The record also shows that the prices listed in Finding of Fact 3 we applicable to such produce. There was initially some dispute as to the pri applicable to the Suntan bell peppers shipped December 11, 1984, howev complainant abandoned his claim for a higher amount than that shown Finding of Fact 3 as applicable to such peppers. The record shows th respondent has paid complainant a total of $6,867.45 of the original $15,599. purchase price relative to the produce. Respondent's defense to complainan claim for the balance of the purchase price consists of specific complain relative to the quality of various portions of most of the loads of produ shipped. Respondent had two federal inspections made relative to some the produce. These inspections were made at least three days following th arrival of the produce, assuming a two-day transit time between Florida an respondent's place of business in Beltsville, Maryland. In addition, th inspections were made after the produce was unloaded from the truck an placed in respondent's warehouse. Such inspections could easily cove produce from prior shipments that had been held over by respondent. Fo these reasons, such inspections do not substantiate respondent's claim that th produce shipped was of poor quality. Since respondent accepted the produce it had the burden of proving a breach of contract on the part of complainan We find that respondent has not met this burden of proof and is liable t complainant for the full purchase price of the produce which it accepted, o a balance of $8,546.80. Respondent's failure to pay to complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Respondent submitted a counterclaim which was based in part on the allegation that it was due $900.00 from complainant for boxes furnished by respondent to complainant. There is no showing that respondent has ever made a demand upon complainant for the return of the boxes, and, in addition, complainant has asserted in reply to the counterclaim that he has been and is still willing to return the boxes to respondent at any time. This portion of respondent's counterclaim should be dismissed. In addition, respondent claimed loss of profits in the amount of $1,500.47 in connection with several of the items of produce set forth in Finding of Fact 3, a loss of $898.25 in connection with the 304 Suntan peppers shipped December 12, 1984, which respondent alleges were a complete loss, and a loss of $732.90 in

connection with the shipments of January 2 and 3, 1985. Respondent must fail in regard to each of these claims due to its failure to prove any breach of contract on the part of complainant. This portion of the counterclaim should also be dismissed.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $8,546.80, with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

KIRK PRODUCE, INC., v. BRUCE CHURCH, INC.
PACA Docket No. 2-7268.
Order on Reconsliieratlon filed August 13, 1987.

Order on Reconsideration issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on June 10, 1987, awarding reparation plus interest to complainant in the amount of $5,424.00. On June 22, 1987, respondent requested that the decision be reconsidered. On July 7, 1987, the Order was stayed to allow respondent to file its petition for reconsideration. It did so on July 20, 1987.

Order

The Order dated June 10, 1987, remains as issued, except that is shall become effective 30 days from the date of this Order.

Copies of this Order shall be served upon the parties.

MENDELSON-ZELLER CO., INC. v. KLEIMAN & HOCHBERG, INC.
PACA Docket No. 2-7385.
Order of Dismissal filed August 6, 1987.

Dennis Becker, Presiding Officer.
Eugene Garfinckle, Esquire, San Francisco, California, for Complainant.
Stephen P. McCarron, Silver Spring, Maryland, for Respondent.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timel complaint was filed in which complainant seeks reparation against responden in the amount $165,535.29 in connection with transactions involving th shipment of mixed fruit and vegetables in interstate commerce.

By letter dated July 16, 1987, the parties jointly notified the Department that settlement had been reached. The parties, in their joint letter of July 16, 1987, authorized dismissal of the complaint and counterclaim filed herein.

Accordingly, the complaint is hereby dismissed. The counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

STEPHEN PAVICH & SONS v. R&C PRODUCE.
PACA Docket No. 2-7584.
Reparation Order filed August 13, 1987.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Reparation Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

Respondent was ordered to pay complainant, as reparation, $2,798.00, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

RANCH Dos PALMAS v. DON PELUCCA and/or FRESH BEGINNINGS and/or INTERNATIONAL A. G., INC.
PACA Docket No. 2-7441.
Order Reopening After Default filed August 13, 1987.

Andrew Y. Stanton, Presiding Officer.
Matthew M. McInerney, Newport Beach, California, for Complainant.
Don Pelucca, pro se.
Fresh Beginnings, pro se.
C. Peter Buhler, Esquire, Brandon, Mississippi, for International A.G., Inc.
Order Reopening After Default, issued by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent Don Pelucca's default in the filing of an answer is set aside and the proposed answer submitted by the respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

SARAS, INC., v. CONTINENTAL FARMS, INC.
PACA Docket No. 2-7120.
Decision and Order filed August 14, 1987.

Failure to specifically deny, in more than a general denial, multi-fact allegations, is insufficient to comply with the Rules of Practice - Set-off jurisdiction lost by the Secretary after 9 months.

Complainant sold and shipped various produce to respondent. Respondent received, accepted and partially paid for the produce, failing to pay the balance. Judgement for complainant.

Allan R. Kahan Presiding Officer.
Complainant, Pro se.
Joseph T. Walsh, Jr., Marton, New Jersey, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities act, 1930, as amended (7 U.S.C. § 499 *et seq.*). A timely complaint was filed on August 8, 1985. Complainant seeks to recover $6,937.96, which amount is alleged to be the outstanding balance for two truckloads of mixed vegetables sold to respondent and shipped in interstate commerce during the period February 18, 1985, through February 25, 1985.

A copy of the Department's report of investigation was served upon the parties. Respondent filed an answer to the complaint in which it claimed a set-off in excess of the amount complainant alleges is owed by respondent.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), therefore, applicable. Pursuant to this procedure the verified pleadings of the parties are considered part of the evidence of this case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Neither party filed any further evidence or briefs.

Findings of Fact

1. Complainant, Saras, Inc., is a corporation whose address is P. O. Box 1502, Nogales, Arizona 85628. At the time of the transactions involved herein, complainant was licensed under the Act.

2. Respondent, Continental Farms, Inc., is a corporation whose address is Road 2, P. O. Box 107. Wrightstown, New Jersey 08562. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On February 2, 1985, complainant, by oral contract, sold respondent 210 cartons of Serrano peppers at $14.00 per cartons; 60 lugs of Italian squash at $8.00 per lug; and 121 cartons Pickles 3/400 at $16.00 per carton f.o.b. Nogales, Arizona, plus pallets at $.65 per carton and lug, ice at $40.00, and one unit Ryan #408940 at $22.50 for a total invoice value of $5,672.65. These vegetables were loaded at Nogales, Arizona and destined for responded at Wrightstown, New Jersey. The vegetables were received and accepted by respondent.

4. On February 25, 1985, complainant, by oral contract, sold respondent 84 cartons of Jalepeno peppers at $24.00 per carton f.o.b., Nogales, Arizona, plus pallets at $.65 per carton, for a total invoice value of $2,070.60. These peppers were loaded at Nogales, Arizona, and destined for respondent at

Wrightstown, New Jersey. The peppers were received and accepted respondent.

5. Respondent has remitted $805.29 to complainant in connection wi the vegetable transactions set forth in paragraphs 3 and 4.

6. A formal complainant was filed on August 8, 1985, which was with nine months of when the causes of action stated herein accrued.

Conclusions

In its answer, respondent denies receipt and acceptance and owing a remaining money on the shipments of the two loads of vegetables sold l complainant. Complainant's evidence of partial payment by respondent $805.29 shows the two shipments were shipped to respondent. Section 47.8(l of the Rules of Practice (7 C.F. R. § 47.8(b)) sets forth the requirements an answer filed in connection with a reparation proceeding under th Perishable Agricultural Commodities Act, and provides in relevant portio that: "Such answer shall contain (1) a precise statement of the facts whic constitute the grounds of defense, including any set-off or counterclaim an shall specifically admit, deny or explain each of the allegations of th complaint, unless respondent is without knowledge, in which case the answe shall so state . . . ." Paragraph 6 of the complainant's complaint to whic respondent gave a one word denial, contains four allegations: (1) that th merchandise arrived at respondent's place of business; (2) that responden accepted the commodities in compliance with said contract of sale; (3) tha respondent has made a partial payment of $805.29 for said commodities; an (4) that a balance due of $6,937.96 remains unpaid by respondent. More i required of respondent than the one word denial to four allegations set forth in paragraph 6 of the complaint. Given the bill of lading and the partia payment of $805.29 made by respondent, to which respondent failed tc respond "specifically," we conclude that the commodities were received an accepted in connection with both shipments.

Respondent's answer sets forth a "counter claim" which should be properly called a "set-off" for two contracts of butternut squash sold to complainant. One transaction was dated February 5, 1985, for 840 boxes of butternut squash for $4,810.50; and the other transaction was dated February 23, 1985, for 882 boxes of butternut squash for $5,103.30. Respondent's answer was filed on January 3, 1986, more than nine months after the cause of action on the butternut squashes arose. Therefore, the Secretary has no jurisdiction over the two transactions set forth in respondent's set-off. *See, Jebavy-Sorenson Orchard Company* v. *Lynn Foods Corporation,* 32 Agric. Dec. 529 (1973).

We find that there is $6,937.96 still due and owing from respondent in connection with the two shipments of commodities. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $6,937.29, with interest thereon at the rate of 13% per annum form April 1, 1985, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served on the parties.

H. SCHNELL & CO., INC., v. MEDINA FRUITS & VEGETABLES, INC.
PACA Docket No. 2-7209.
Decision and Order filed August 6, 1987.

Accept - Acceptance - Breach of Contract - Damages.

Where Shipper breaches contract to ship U.S. No.1 oranges, buyer who accepts is entitled to deduct damages from contract price.

Edward Silverstein, Presiding Officer.
Complainant, pro se.
Henry L. Zwerg, for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.)* A timely complaint was filed in which complainant seeks $8,640.00, as reparation, from respondent in connection with one transaction, in interstate commerce, involving oranges, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint. As it failed to file a timely answer, a Default Order was issued against respondent on March 3, 1986. This order was stayed on April 10, 1986, after respondent moved to have its default set aside. By order dated June 26, 1986, the respondent's default was set aside, and thereafter respondent filed a timely answer in which it denied any liability to complainant.

As the amount in dispute did not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (C.F.R.§ 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. Also, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, H. Schnell & Company, Inc., is a corporation whose mailing address is 243 N.Y.C. Terminal market, Bronx, New York 10474.

2. Respondent, Medina Fruits & Vegetables, Inc., is a corporation whose mailing address is 583 Liberty Avenue, Brooklyn, New York 11207. At all material times, respondent was licensed under the Act.

3. On or about May 24, 1985, Seald Sweet Sales, Inc., ("Seald Sweet") Tampa, Florida, sold a trucklot of oranges to Central Produce, Inc., which, as complainant, is located on the Hunt's Point Market in Bronx, New York. The trucklot consisted of 1,080 cases of size 64 "Lake Gold Brand" oranges stamped "Valencia 64". Upon arrival, on May 29, 1985, the oranges were the subject of a federal inspection. On the inspection certificate issued thereafter,

it was noted that the oranges failed to grade U.S. No 1 on account of their condition.[1] In view of that, Mr. Bob Krupnick, the buyer for Central Produce, Inc., called Mr. John L. Conner, of Seald Sweet. Mr. Krupnick rejected the oranges, and refused to handle them under any conditions. Consequently, after Mr. Tom Sikorsky of Seald Sweet's New York office arranged for complainant to handle them on consignment, Mr. Conner asked Mr. Krupnick to instruct the truck driver to move the oranges to complainant's location.

4. On or about Thursday, May 30, 1985, complainant sold the oranges to respondent. [2] The term of sale was $8.00 f.o.b. per carton, or a total of $8,640.00. The trailer containing the oranges was picked up at complainant's location on Thursday afternoon, and arrived at respondent's location at about 6:30 p.m. After inspecting the oranges on Friday morning, respondent contacted complainant and sought to have it send an employee to view the oranges. Complainant refused, but instructed the respondent to leave the oranges in the truck, with the refrigeration unit operating, until Monday for further instructions. On Monday, after concluding that the complainant was not going to take any action regarding the oranges, respondent sought a federal inspection. The inspection could not be done until the following day.

5. The market price for size 64 Valencia oranges on the New York market on May 30, 1985, was reported as ranging from $9.00 to $10.00 by the Market News Service.

6. On Monday, June 3, 1985, respondent sold 100 cartons of oranges at $4.75 per carton ($475.00).

7. On Tuesday, June 4, 1985, the oranges were the subject of a second federal inspection. On the inspection certificate issued thereafter (No. E 208950), it was noted that the oranges had been unloaded off of the truck and was stacked in respondent's warehouse. It was further noted that the temperature of the oranges ranged from 46° F., that the lot contained 5% grade defects, and that the condition of the oranges was as follows: "Mostly firm. 2 to 22 fruit (4 to 44%) per sample total 114 fruit (19%) Sour Rot and Blue Mold Rot in various stages." The oranges failed to grade U.S. No.1 on account of their condition.

8. On June 4, 1985, respondent sold 300 cartons of the oranges for $4.50 per carton ($1,350.00), and 250 cartons of oranges for $4.25 per carton ($1,062.50).

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[1] The inspection certificate issued thereafter (No. C-081032) indicates that the lot had about 5% grade defects, as well as about a total of 13% condition defects. An appeal inspection of the lot was conducted on the next day. On the inspection certificate issued thereafter (No. E 234849), it is reflected that the lot had 5% grade defects, as well as 9% condition defects including 4% serious damage. It is noted, with some chagrin, that the record does not contain a readable copy of either of these inspection certificates.

[2] In its opening statement, complainant alleges that it "sold" the oranges to Mr. Krupnick, the buyer for Central Produce, Inc., who earlier had rejected them back to Seald Sweet. Complainant also states that Mr. Krupnick asked it to bill the respondent for the oranges. This is inconsistent with the statement it makes in its statement in reply in which it calls Mr. Krupnick respondent's "broker." Moreover, it seems strange to us that Mr. Krupnick after refusing to handle the oranges under any conditions, as is attested to by Mr. Conner of Seald Sweet, would then turn around and involve himself with them after the oranges came into complainant's hands. In any event, the respondent denies that Mr. Krupnick acted for it in any manner. Moreover, there is no proof on the record supporting any of complainant's allegations as to Mr. Krupnick.

9. On June 5, 1985, respondent sold 330 cartons of oranges for $4.35 per carton ($1,435.50), and 100 cartons of oranges for $4.30 per carton ($430.00).

10. The formal complaint was filed on July 17, 1985, which was within nine moths after the cause of action herein accrued.

Conclusions

There is much discussion in the record concerning whether or not the respondent had the right to reject the oranges after they were picked up at complainant's location. While we note that nowhere does complainant prove that this was an f.o.b. acceptance final contract, it is clear to us that, because the respondent sold 100 cartons of the oranges on June 3, 1985, before the oranges were inspected, and because the oranges were unloaded off of the truck at the time of the June 4, 1985, federal inspection, respondent accepted the oranges.[3] *Thereon Hooker v. Ben Gatz Co.,* 30 Agric. Dec. 1109 (1971); *Baltes Potato Co. v. I. Kallish & Sons,* 18 Agric. Dec. 301 (1959). Thus, respondent is liable to complainant for the full contract price less any damages resulting from a breach of contract committed by complainant. *Rocky Ford Dist. Co. v. Angel Produce,* 29 Agric. Dec. 93 (1970). Respondent has the burden of proving, by a preponderance of the evidence, that complainant breached the parties' contract and the amount of its damages. *The Growers-Shipper Pot Co. v. Southw. Pro. Co.,* 28 Agric. Dec. 571 (1969).

The next issue which we must discuss is whether the complainant breached the parties' contract by shipping oranges which were not U.S. No. 1. Respondent contends that it expected U.S. No. 1 oranges, and that it had no idea until after it received them that the oranges had failed to grade so on May 29, 1985, and May 30, 1985. Complainant contends that, as Mr. Bob Krupnick who had rejected the oranges on behalf of Central Produce, Inc., knew that condition of the oranges and, as he acted on behalf of respondent, respondent must have known of their condition. As we noted earlier, respondent contends that Mr.Krupnick did not act for it as either buyer or broker as to these oranges. The record supports respondent's claim Therefore, we hold that the complainant held these oranges out to respondent as being U.S. No. 1 and that, as the oranges failed to grade U.S. No.1 complainant breached the parties' contract.

The respondent's damages are computed as follows: the value of the oranges had they met contract requirements is the Market News price ($9.00 x 1,080 or $9,720.00), less the value of the oranges actually received, which is the total gross proceeds received on resale ($4,753.00), pr $4,967.00. As respondent has not claimed any other reimbursable costs, its total damages are the same. Subtracting this amount from the parties' agreed contract price ($8,640.00) leaves a balance due complainant of $3,673.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest ought to be awarded.

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[3] Complainant's claim that it refused to "accept" the rejection is irrelevant as it does n have that right.

Order

Within thirty days from the date of this order, respondent shall pay complainant $3,673.00, as reparation, plus interest at the rate of 13% per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SIX L'S PACKING CO., INC. v. TRAY-WRAP, INC.
PACA Docket No. 2-6858.
Decision and Order filed August 14, 1987.

Agent of buyer responsible for complying with prompt delivery of confirmation of sale - Credibility of witness must be considered along with documentary evidence - Warranty of suitable shipping condition not applicable where diversion of product by respondent to gas and ripen the commodity - Attempts to introduce evidence after the hearing, is improper.

Agent for respondent purchased tomatoes from complainant after inspecting same. Respondent had third party gas and ripen tomatoes. On arrival, tomatoes graded US combination. Agent and respondent claimed contact was for 85% US No. 1 held for complainant.

Allan R. Kahan, Presiding Officer.
Stephen P. McCarron, Esq, Silver Spring MD, for Complainant.
Linda Strumpf, Bronx, New York for Respondent.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 400a *et seq.*). A formal complaint was filed on February 21, 1985, in which complainant seeks an award of reparation against respondent in the amount of $49,485.00 in connection with six shipments of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was ·erved on each of the parties, and respondent was served with a copy of the ıplaint. Respondent filed an answer to the complaint denying liability, and ·med it had sent complainant, through the U.S. Department of Agriculture, ıeck for $31,024.00 as the undisputed amount. Respondent also filed a nterclaim.

Both complainant and respondent requested an oral hearing, and such was l on the August 5 and 6, 1986, in New York City, New York. One witness ified for complainant, and two witness testified on behalf of respondent. aplainant introduce fifteen (15) exhibits. Respondent introduced sixteen) exhibits.

Findings of Fact

1. Complainant Six L's Packing Company, Inc., is a corporation whose dress is P.O. Box 1987, Hollywood, Florida 33022.

2. Respondent Tray Wrap, Inc., is a corporation whose address is 230 W. 30 Street, Bronx, New York 10463. At all times material herein, respondent was licensed under the Act.

3. On or about December 4, 1984, complainant sold respondent, on nvoice no. F-11550, 1600 25 pound cartons of U.S. Combination grade 5 X 6

(extra-large) tomatoes for a total price of $8,240.00 f.o.b. complainant's packing house in Inmmokalee, Florida.

4. On or about December 4, 1984, complainant sold to respondent, on invoice no. F-11554, 1600 25 pound cartons of U.S. Combination grade 5 X 6 (extra-large) tomatoes for a total price of $8,240.00 f.o.b. complainant's packing house in Immokalee, Florida.

5. On or about December 5, 1984, complainant sold to respondeot, on invoice no. F-11563, 1600 25 pound cartons of U.S. Combinatioo grade 5 X 6 (extra-large) tomatoes for a total price of $8240 f.o.b. complainant's packiog house in Immokalee, Florida.

6. On or about December 5, 1984, complainant sold to respondent, on invoice no. f-11569, 1600 25 pound cartons of U.S. Combination grade 5 X 6 (extra-large) tomatoes for a total price of $8,240 f.o.b. complainant's packing house in Immokalee, Florida.

7. On or about December 11, 1984, complainant sold to respondent, on invoice no. F-11690, 1600 25 pound cartons of U.S. Combination grade 5 X 6 (extra-large) tomatoes for a total price of $8,240.00 f.o.g. complainant's packing house in Immokalee, Florida.

8. On or about December 11, 1984, complainant sold to respondent, on invoice no. f-11692, 1600 25 pound cartons of U.S. Combination grade 5 X 6 (extra-large) tomatoes for a total price of $8,240.00 f.o.b. complainant's packing house in Immokalee, Florida.

9. Prior to the times tomatoes which are set forth in paragraphs 3 through 8 were received and accepted by respondent, the tomatoes were inspected aod found to grade U.S. Combination. The U.S. Combination grade requires 65 percent of the tomatoes to grade U.S. No. 1.

10. Prior to their purchase, the tomatoes were visually inspected and selected by Mr. Steven Heyer, broker for respondent.

11. After the tomatoes were federally inspected, they were received an accepted by respondent, loaded on the truck hired by respondent, and brough to Hockaday's in Immokalee, Florida, for degreening. The degreening proces uses ethyl gas to ripen to mature tomato, while the temperature and humidit are controlled to insure the color and condition are obtained at the desire time.

12. After were degreened, the tomatoes were transported via the same truck to the respondent's place of business in Bronx, New York.

13. By check dated March 29, 1985, respondent paid complainant $31,024.00, for the tomatoes set forth in paragraphs 3 through 8.

14. A formal complaint was filed on February 21, 1985, which was within nine (9) months of the time the cause of action arose.

Conclusions

The primary issue involved in this matter is whether complainant and respondent contacted for the purchase of 85% U.S. No. 1 or U.S. Combination tomatoes. U.S. Combination grade tomatoes only requires 65% of the tomatoes to grade U.S. No. 1 The purchase of the tomatoes wa negotiated by Mr. Steve Heyer, an agent for respondeot with respect to thi group of tomatoes, as well as other tomatoes and produce which respondent

purchases. Mr. Heyer acted as respondent's broker with respect to these tomatoes.

On Tuesday, December 4, 1984, Mr. Heyer spoke to complainant's salesman, Mr. Jack Moon, at complainant's sale office, expressed interest in procuring up to eight (8) loads of tomatoes, and made reference a particular lot of tomatoes which were at complainant's warehouse and as to which Mr. Heyer had made at least a cursory inspection. An Oral agreement was entered into for two loads of 1600 25lb. cases of 5 X 6 tomatoes, which then were loaded on trucks procured by Mr. Heyer. Mr. Heyer returned on Wednesday, December 5th, to purchase two more loads, which were promptly loaded onto trucks procured by Mr. Heyer. On Tuesday, December 11, Mr. Heyer orally contracted for two final loads, making a total of six loads. On Wednesday, december 12, 1984, at 11:30a.m., after all six loads had been loaded by complainant, and had been received and accepted by respondent, Mr. Heyer finally brought over the broker's memoranda regarding all six loads. The broker's memoranda stated that the tomatoes contracted for were to grade 85% U.S. #1. Complainant's employee, Mr. Jack Moon, contested the grade set forth on the broker's memoranda and wrote the date and the time he received the memos the top left corner of each memo.

The obligations and duties of a broker are set forth at section 46.28 of the regulation (7 C.F.R. § 64.28). Subsection (a) of that section provides:

> (a) General. The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification duty, express on implied, in connection with any transaction is in violation of the Act and is subject to penalties specified in the Act and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to fully inform the parties concerning all of the terms and conditions of the proposed contract. After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due. The broker shall retain a copy of such confirmations or memoranda as part of his accounts and records. The broker who does not prepare these documents and retain copies in his files is failing to prepare and maintain complete and correct records as required by the Act. The broker who does not deliver copies of these documents to all parties involved in the transaction is failing to perform his duties as a broker. A broker who issues a confirmation or memorandum of sale containing false or misleading statements shall be deemed to have committed a violation of Section 2 of the Act. If the broker's records do not support his contentions that a binding contract was made with proper notice to to the parties, the broker may be held liable for any loss or damage resulting from such negligence, or for other penalties provided by the Act for failure to perform his express or implied duties. The broker shall take into consideration the time of delivery of the shipment involved in the contract and all other circumstances of the transaction, in selecting the proper method for transmitting the written confirmation or memorandum of sale to the parties. A buying broker is required to truly and correctly account to his principal in accordance with § 46.2(y)(3). The broker should advise

his principal promptly of rejection by the buyer or of any other unforeseen development of which he is informed.

As the regulation clearly sets forth, the broker is required to promptly prepare and deliver to the parties a confirmation or memorandum of sale setting forth the details of the agreement. We find that Mr. Heyer did not comply with the prompt delivery standard set forth in the regulation. Mr. Heyer testified that he delivered the memoranda to Mr. Moon at the complainant's sales office on December 8. December 8, 1984, however, was a Saturday, a day on which Mr. Moon claimed he was not in the office but rather home, as it was his day off. Mr. Moon claimed that he received the broker's memoranda for all six loads from Mr. Heyer on Wednesday, December 11, at 11:30 a.m., after all the loads had been loaded and shipped on respondent's trucks, and wrote the date and time he received them on the memoranda. When all the testimony of both witnesses is examined, Mr. Heyer's memory of the event is less persuasive and credible than Mr. Moon's.

Mr. Moon testified that Mr. Heyer claimed not to have broker's memoranda in his car on December 4, at the time he contracted with Mr. Moon for the first two loads. Mr. Heyer never directly contradicted Mr. Moon's testimony. Mr. Heyer's explanation was equally unplausible when he testified that there were terms of the "contract" which he needed to place on the memorandum, including the temperature the tomatoes were to be shipped at or the date they were to be shipped. Theses "reasons" given by Mr. Heyer stretch the bounds of credibility. Both pieces of information must be transmitted to the shipper. in this case Seabord, and not the seller. Such information has nothing to do with the contract with complainant - since the tomatoes went immediately from complainant's packing house after loading to Hockaday's for gassing, and complainant had no responsibility for shipment to New York.

During the oral hearing, respondent's counsel inferred that respondent would show that complainant sold 85% U.S. No. 1 during this period. Respondent did not proffer such evidence.

Mr. Moon testified that complainant has sold only U.S. Combination grade since he has worked for complainant during the past six years. Respondent was unable to rebut this fact, although respondent did present evidence in its brief that complainant sold 85% U.S. No. 1 or better may years ago. Respondent argues that the broker's memoranda relating to the sale clearly show 85% U.S. No. 1 were ordered, and that each such memorandum is considered a valid contract between the parties. Respondent cites *Nova Scotia Blueberry Exporters* v. *Cushman Packing Company*, 28 Agric. Dec. 79 (1969), in support of its argument, but that case offers no real support. In *Nova Scotia*, respondent's agent contracted with complainant for the produce involved, with apparent authority to so contract. No objection to the written Confirmation of Sale was made by respondent. In the facts of the case before us, complainant immediately objected to the terms of the broker's memoranda which Mr. Heyer presented Mr. Moon on the December 11th, as not constituting an accurate reflection of the terms of the contract.

Mr. Heyer professed to having sufficient expertise to distinguish between 85% U.S. No. 1 or better and U.S. Combination (Transcript pp. 201-202). By his own testimony, Mr. Heyer took approximately 15-20 minutes to watch the sorting of the tomatoes of each day's purchase. We surmise that Mr. Heyer, upon seeing the tomatoes in bins and liking how they looked, contracted for their purchase with Mr. Moon without ever mentioning grade.

Even the telegrams lend support to complainant's version of the facts. The first telegram, sent by Mr. Heyer on December 6th, confirms the purchase of tomatoes, but had no mention of grade. The telegram sent by complainant in response, on December 10th, did not mention grade. The telegram sent on Tuesday, December 11th, at 5:22 p.m. EST which related to the first 4 loads at issue, did mention 85% U.S. No. 1 grade, but this was almost six hours *after* the tomatoes arrived in New York and the first inspection of the tomatoes occured (Inspection Certificate C-076521) in which the tomatoes graded 60% U.S. No. 1 - which is within the U.S. Combination grade requirements at destination. It is interesting to note that all telegrams sent by Mr. Heyer after the initial arrival inspection clearly set forth the 85% U.S. No. 1 grade requirement, while those prior to that time do not set forth any grade.

From all the evidence in the record, the facts are clear. We find that respondent's agent Mr. Heyer, contracted for six loads of the tomatoes he saw at complainant's packing house; that the tomatoes with which complainant filled respondent's order graded U.S. Combination;; and that the memoranda of purchase were submitted to complainant after all six loads ;had been loaded and left complainants loading dock. The respondent, through Mr. Heyer, contracted for the purchase of U.S. Combination grade tomatoes.

The next question to be answered is what were the terms of shipment. Complainant argues that the transaction was an f.o.b. acceptance final sale, with its liability ending at complainant's loading dock. Respondent argues that even if it was an f.o.b. transaction, the tomatoes were covered ;under a warranty of "suitable shipping condition." The definition of suitable shipping condition is defined in 7 C.F. R. § 46.43(j), which provides:

> "Suitable shipping condition", in relation to direct shipments, means that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. If a good delivery standard for a commodity is set forth in § 46.44 and that commodity at the contract destination contains deterioration in excess of any tolerance provided herein, it will be considered abnormally deteriorated. The seller has no responsibility for any deterioration in transit if there is no contract destination agreed upon between the parties.

Unfortunately for respondent, the warranty of "suitable shipping condition" is applicable only for direct shipments, a situation we did not have here. *Westside Growers* v. *Mid-West Fruit Co.*, 24 Agric. Dec. 1139 (1965). It was admitted that the tomatoes were brought to Hockaday's for gassing and degreening. We find that although the complainant had space available to degreen tomatoes, they were sent by Mr. Heyer to Hockaday's primarily

because of the 35¢ per box difference in price. Contrary to respondent's argument, it is not hard to imagine Mr. Heyer bringing them to Hockaday's because of the difference in cost between the two services. Complainant charged more that three times the amount for degreening tomatoes than did Hockaday. If a purchaser or his buyer were to believe that the service rendered was virtually identical, as Mr. Heyer's testimony on this matter seemed to indicate, the extra cost of the complainant's degreening charge would seem to be a foolish expense. We believe the $560.00 savings for each load, or a total of $3,360.00 for the six loads, was the reason for respondent's use of Hockaday's degreening facilities and services, rather than complainant's.

With this diversion to Hockaday's and subsequent gassing, the tomatoes were no longer being handled under normal transportation service and conditions, no longer constituted a direct shipment, and the warranty of suitable shipping condition would not be applicable. The pre-shipment inspections show that all six load of tomatoes graded U.S. Combination. The tomatoes were accepted by respondent upon being loaded onto the Seaboard trucks. As a result of their diversion, the warranty of suitable shipping condition is inapplicable. The two cases respondent cites, *Arkansas Tomato Co.* v. *M-K Produce Co., Inc.*, 40 Agric. Dec. 1773, and *Dumont Packing Co.* v. *Albert Ursini*, 31 Agric. Dec 1187 (1982), have no relevance or support for respondent's position since in neither case are abnormal transportation conditions alleged or apparent.

A word must be said about an argument made by respondent's counsel's in her brief. Respondent's brief argues passionately for its position. However, in its argument and recitation of the facts, it steps beyond proper and professional argument. The most glaring and odious of these occasions is on the issue of whether complainant ever sold 85% U.S. No. 1 tomatoes.

The issue might have been relevant to this proceeding had respondent been able to show that complainant sold 85% U.S. No. 1 tomatoes during the very season here involved, which it did not, or that it had sold such grade within the past few years so as to impeach the credibility of Mr. Moon's memory and thereby his testimony. Respondent's brief quotes from Mr. Moon's testimony that to his knowledge, which went back six years, complainant never sold 85% U.S. No. 1 tomatoes; and cites Mr. McCarron's opening statement where he states that the combination grade is all complainant ever sells. These two statements are characterized as "...*blatant lies*." (emphasis from respondent's brief). For support, respondent's counsel cites two cases, *Six L's Packing Co., Inc.* v. *Nat Feinn & Son*, 22 Agric. Dec. 554 (19643), and *Six L's Packing Company, Inc.*, v. *Louis M. Speer & Co.*, 28 Agric. Dec 221 (1969). Although it is clear that in both of those cases the respondent involved in this case sold 85% U.S. No. 1 tomatoes, the transactions in those cases took place in December, 1960 and December, 1967, more than eighteen and twenty-five years prior to this hearing and more than ten years prior to Mr. Moon's employment with [illegible]. Since all the definitions of "lie" this tribunal has legal and common usage, include the element of deception, given the facts of this case, respondent Mr. McCarron's statement and Mr. Moons's testi

standard of professional advocacy, and does not enhance the credibility of respondent's argument.

In addition, respondent's brief attempted, unsuccessfully, to introduce further evidence into the record, in the form of notarized letters and statements from alleged tomato buyers. As was stated in the Presiding Officer's Notice of Acceptance of Respondent's Brief, filed November 12, 1986, such attempt to introduce evidence into the record after the hearing and without being subject to cross-examination and complainant's scrutiny, is highly improper and unprofessional.

Finally, respondent's entire brief is filled with incomplete and inaccurate readings of the documentary evidence introduce at the hearing. One example will suffice to demonstrate the problem. Respondent introduced documentary evidence relating to a credit or allowance given to respondent by complainant on an order of tomatoes shipped May 1, 1984, which graded 60% U.S. Combination. Upon arrival in New York, and inspection on May 3, a portion of the cartons were crushed. Respondent's brief attempts to argue that the allowance was given because the tomatoes did not grade 85% U.S. No. 1, and states:

> Of course,documentation was introduced in evidence at the hearing (Exhibits R 15a, 15b and 15c) which indicate Six L's had granted an allowance on a shipment which made 60% U.S. Combination grade. There could be no other reason for the allowance because there is no indication whatsoever that the tomatoes in the 72 segregated cartons were in poor condition; in fact the only thing which U.S.D.A. reports on regarding the 72 cartons is the conditions of the cartons, not the product. [p.15]

However, had respondent's counsel bothered to read the evidence she introduced, she would have read the following from the Inspection Report [Respondents Exhibit 15b]

> Condition of containers:
> segregated lot: all cartons creased from ½ to 3½ inches with some to most tomatoes being crushed, split, and leaking and/or bruised.

"Crushed, split and leaking and/ or bruised" relates to the tomatoes's condition. Also, since respondent's counsel attempt to make the case for respondent that it only purchased 85 U.S. No. 1 tomatoes, her introduction of such evidence, since on none of the exhibits is there any reference to 85% U.S. No. 1 tended, to contradict her primary position. All the facts presented by respondent of the May 1, 1984, transaction would seem to suggest that respondent also purchased a load of U.S. Combination grade, not a load of 85% U.S. No. 1 tomatoes from complainant.

Complainant fulfilled its obligations under the contract, respondent did not. Respondent is liable to complainant for the full amount of the contract price of $49,845.00, less the partial payment made to complainant on the undisputed amount of $31,024.00, leaving a balance due complainant of $18,461.00. Respondent's failure to pay such to complainant is a violation of section 2 of the Act for which reparation should be awarded, with interest.

As complainant is the prevailing part, it is entitled to reasonable fees and expenses incurred in connection with the hearing by reason of section 7(a) of the Perishable Agricultural Commodities Act (7 U.S.C. 499g(a)). Complainant has submitted a claim for fees and expenses for $5,922.25. Such fees and expenses appearing reasonable and having not been objected to by respondent, complainant is entitled to an additional award of reparation in that amount.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $18,461.00, with interest thereon at the rate of 13% per annum from January 1, 1985, until paid, and the amount of $5,922.25, with interest thereon at the rate of 13% per annum from the date of this order until paid.

Respondent's counterclaim is dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

(Summarized)

SAM ANDREWS' SONS v. PAT WOMACK INC.
PACA Docket No. RD-87-394.
Default Order Issued August 10, 1987.

Respondent was ordered to pay complainant, as reparation, $2,310.00, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

ARKANSAS VALLEY PRODUCE OF TEXAS, INC. v. STOOPS DISTRIBUTING, INC.
PACA Docket No. RD-87-408.
Default Order issued August 12, 1987.

Respondent was ordered to pay complainant, as reparation, $9,150.75, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

ASSOCIATED POTATO GROWERS, INC. v. ILIAS D. GINANNAKOPOULOS d/b/a LOUIS PRODUCE COMPANY.
PACA Docket No. RD-87-416.
Default Order Issued August 18, 1987.

Respondent was ordered to pay complainant, as reparation, $334.50, plus 3 percent interest per annum thereon from September 1, 1986, until paid.

BABYLON BANANA CORP. v. RED APPLE FRUIT FARMS, INC.
PACA Docket No. RD-87-411.
Default Order Issued August 12, 1987.

Respondent was ordered to pay complainant, as reparation, $8,256.75, plus 13 percent interest per annum thereon from June 1, 1986, until paid.

WILLIAM H. BAILEY d/b/a W. H. BAILEY PRODUCE v. WAYNE ASLEY d/b/a CRAFT TOMATO CO.
ACA Docket No. RD-87-447.
efault Order Issued August 27, 1987.

Respondent was ordered to pay complainant, as reparation, $14,400.00, plus 13 percent interest per annum thereon from June 1, 1986, until paid.

BALDWIN-STATE, INC. v. CENTRAL PRODUCE CO., INC.
PACA Docket No. RD-87-386.
Default Order issued August 5, 1987.

Respondent was ordered to pay complainant, as reparation, $1,080.00, plus 13 percent interest per annum thereon from January 1, 1986, until paid.

BARRETT PRODUCE CO. v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-413.
Default Order issued August 18, 1987.

Respondent was ordered to pay complainant, as reparation, $4,293.00, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

BELRIDGE PACKING CO. v. TWIG OF MIAMI INC. A/T/A BEST PRODUCE.
PACA Docket No. RD-87-382.
Default Order issued August 4, 1987.

Respondent was ordered to pay complainant, as reparation, $5,137.20, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

BIG O FOODS, INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.
PACA Docket No. RD-87-383.
Default Order issued August 4, 1987.

Respondent was ordered to pay complainant, as reparation, $12,255.00, plus 13 percent interest per annum thereon from June 1, 1986, until paid.

BILLY THE KID PRODUCE INC. v. B.H. COMPANY, INC.
PACA Docket No. RD-87-392.
Default Order issued August 10, 1987.

Respondent was ordered to pay complainant, as reparation, $10,825.00, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

BONITA VALLEY APPLE CO., INC. v. HANSEN FOODS INC.
PACA Docket No. RD-87-372.
Default Order Issued August 3, 1987.

Respondent was ordered to pay complainant, as reparation, $8,858.19, plus 13 percent interest per annum thereon from December 1, 1985, until paid.

BUDDY'S PRODUCE INC. v. MAC PRODUCE INC.
PACA Docket No. RD-87-404.
Default Order Issued August 11, 1987.

Respondent was ordered to pay complainant, as reparation, $26,000.60, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

CARO PRODUCE & INSTITUTIONAL FOODS INC. v. SIMBAK OF ALABAMA INC.
PACA Docket No. RD-87-423.
Default Order Issued August 20, 1987.

Respondent was ordered to pay complainant, as reparation, $15,590.61, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

CARO PRODUCE & INSTITUTIONAL FOODS INC. v. DOUGLAS L. MORAN d/b/a SALADS SUPREME.
PACA Docket No.RD-87-445.
Default Order Issued August 27, 1987.

Respondent was ordered to pay complainant, as reparation, $300.00, plus 13 percent interest per annum thereon from May 1, 1986, until paid.

C&E ENTERPRISES INC., a/t/a KOYAMA FARMS v. PAT WOMACK INC.
PACA Docket No. RD-87-451.
Default Order Issued August 27, 1987.

Respondent was ordered to pay complainant, as reparation, $11,164.50, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

CHIEF WENATCHEE v. A&E PRODUCE CORP.
PACA Docket No. RD-87-425.
Default Order Issued August 20, 1987.

Respondent was ordered to pay complainant, as reparation, $3,589.60, plus 13 percent interest per annum thereon from January 1, 1987, until paid.

CHIQUITA BRANDS INC. v. TOMATOES INC.
PACA Docket No. RD-87-398.
Default Order Issued August 10, 1987.

Respondent was ordered to pay complainant, as reparation, $3,183.72, plus 13 percent interest per annum thereon from September 1, 1986., until paid.

CORRIN PRODUCE SALES INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.
PACA Docket No.RD-87-390.
Default Order Issued August 5, 1987.

Respondent was ordered to pay complainant, as reparation, $5,362.00, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

COUTURE FARMS v. PAT WOMACK INC.
PACA Docket No. RD-87-450.
Default Order Issued August 27, 1987.

Respondent was ordered to pay complainant, as reparation, $2,520.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

ERNIE DALIDIO d/b/a ZAPATA SALES v. A. SAM & SONS PRODUCE CO. INC.
PACA Docket No. RD-87-399.
Default Order Issued August 11, 1987.

Respondent was ordered to pay complainant, as reparation, $1,720.13, plus 13 percent interest per annum thereon from November 1, 1985, until paid.

GERALD W. DASHER & ROBERT E. DASHER d/b/a G&R FARMS v. STEVE MILLER PRODUCE COMPANY INC.
PACA Docket No. RD-87-388.
Default Order Issued August 5, 1987.

Respondent was ordered to pay complainant, as reparation, $3,282.00, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

GERALD W. DASHER & ROBERT E. DASHER d/b/a G&R FARMS v. STEVE MILLER PRODUCE COMPANY, INC.
PACA Docket No.RD-87-388.
Stay Order issued August 28, 1987.

STAY ORDER

By Letter received August 13, 1987, respondent has moved that this matter be reopened after default. Accordingly, the order of August 5, 1987, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

DE BRUYN PRODUCE CO. v. STOOPS DISTRIBUTING INC.
PACA Docket No. RD 87-401.
Default Order Issued August 11, 1987.

Respondent was ordered to pay complainant, as reparation, $2,960.75, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

DETROIT FRUIT AUCTION CO. v. PHILIP J. VIVIANO AND SAM VIVIANO d/b/a SAM VIVIANO & SONS.
PACA Docket No. RD-87-419.
Default Order issued August 19, 1987.

Respondent was ordered to pay complainant, as reparation, $3,818.10, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

CHARLES F. DIONISIO & RUSSELL L. DIONISIO d/b/a DIONISIO PRODUCE & FARMS v. STOOPS DISTRIBUTING INC.
PACA Docket No. RD-87-429.
Default Order Issued August 21, 1987.

Respondent was ordered to pay complainant, as reparation, $7,348.00, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

D-N-E SALES. INC. v. GORE & FRANK INC.
PACA Docket No. RD- 87-448.
Default Order Issued August 27, 1987.

Respondent was ordered to pay complainant, as reparation, $31,049.68, plus 13 percent interest per annum thereon from June 1, 1986, until paid.

FLORIDA GEORGIA PRODUCE INC. v. DANA R. JOHNSON, d/b/a U.S. FOOD MARKETING and/or LARRY H. PLOTT d/b/a FARM FRESH MARKET.
PACA Docket No. RD-87-402.
Default Order issued August 11, 1987.

Respondent was ordered to pay complainant, as reparation, $4,000.00, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

FRUDEN PRODUCE INC. v. PAT WOMACK, INC.
PACA Docket No. RD-87-393.
Default Order Issued August 10, 1987.

Respondent was ordered to pay complainant, as reparation, $33,489.00, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

FRUITERER LTD. a/t/a QUETZAL BROKERAGE CO. v. MEREX CORP.
PACA Docket No. RD-87-377.
Default Order issued August 3, 1987.

Respondent was ordered to pay complainant, as reparation, $2,326.40, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

GAC PRODUCE CO. INC. v. ROSE CITY PRODUCE INC.
PACA Docket No. RD-87-438.
Default Order issued August 26, 1987.

Respondent was ordered to pay complainant, as reparation, $8,967.00, plus 13 percent interest per annum thereon from December 1, 1986, until paid.

GOLDEN VALLEY DISTRIBUTORS INC. v. DIVERSIFIED FOODS INC.
PACA Docket No. RD-87-426.
Default Order Issued August 20, 1987.

Respondent was ordered to pay complainant, as reparation, $8,596.17, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

GLEN L. GRIMSLEY d/b/a ARKANSAS VALLEY PRODUCE v. STOOPS DISTRIBUTING INC.
PACA Docket No. RD-87-389.
Default Order Issued August 5, 1987.

Respondent was ordered to pay complainant, as reparation, $21,281.80, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

GLEN L. GRIMSLEY d/b/a ARKANSAS VALLEY PRODUCE v. PAT WOMACK INC.
PACA Docket No. RD-87-395.
Default Order Issued August 10, 1987,

Respondent was ordered to pay complainant, as reparation, $4,817.50, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

JOSEPH J. HAKIM d/b/a SUNSET SALES v. MARTIN S. SHOENFELD d/b/a URBAN FOODS.
PACA Docket No. RD-87-444.
Default Order Issued August 26, 1987.

Respondent was ordered to pay complainant, as reparation, $1,215.40, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

INDEX MUTUAL ASSOCIATION v. ILIAS D. GIANNAKOPOULOS d/b/a LOUIS PRODUCE COMPANY.
PACA Docket No. RD-87-391.
Default Order Issued August 5, 1987.

Respondent was ordered to pay complainant, as reparation, $6,498.00, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

INN FOODS INC. v. STEVENS FOOD SERVICE INC.
PACA Docket No. RD-87-405.
Default Order Issued August 11, 1987.

Respondent was ordered to pay complainant, as reparation, $3,000.00, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

J & J PRODUCE CO. v. ANTHONY J. D'ACQUISTO d/b/a TROPIC BANANA CO.
PACA Docket No. RD-87-406.
Default Order Issued August 12, 1987.

Respondent was ordered to pay complainant, as reparation, $2,686.25, plus 13 percent interest per annum thereon from May 1, 1986, until paid.

TOM LANGE COMPANY INC. v. DIVERSIFIED FOODS INC.
PACA Docket No. RD-87-410.
Default Order Issued August 12, 1987.

Respondent was ordered to pay complainant, as reparation, $8,028.40, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

LUSK ONION COMPANY v. SUNWORTH PACKING COMPANY.
PACA Docket No. RD-87-446.
Default Order Issued August 27, 1987.

Respondent was ordered to pay complainant, as reparation, $5,101.40, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

SAM J. MAGLIO, JR. d/b/a MAGLIO & COMPANY v. BIG APPLE WHOLESALE PRODUCE CO. INC.
PACA Docket No. RD-87-422.
Default Order issued August 20, 1987.

Respondent was ordered to pay complainant, as reparation, $5,847.56, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

SAM J. MAGLIO, JR. d/b/a MAGLIO & COMPANY v. I. ZACKS & SONS INC.
PACA Docket No. RD-87-436.
Default Order Issued August 25, 1987.

Respondent was ordered to pay complainant, as reparation, $118,639.84, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

JAMES MATRO & GAETANO MATRO d/b/a JAMES MATRO & SON v. WENDELL L. BARNETT, d/b/a Barnett Brokerage.
CA Docket No. RD-87-403.
ult Order Issued August 11, 1987.

espondent was ordered to pay complainant, as reparation, $4,656.20, plus ercent interest per annum thereon from October 1, 1986, until paid.

CDONNELL & BLANKFARD INC. v. BRETT M. WEST d/b/a TRI-TY PRODUCE.
CA Docket No. RD-87-417.
fault Order Issued August 19, 1987.

Respondent was ordered to pay complainant, as reparation, $2,464.00, plus percent interest per annum thereon from November 1, 1986, until paid.

C. McENTIRE, JR., d/b/a R. C. McENTIRE & CO. v. BRETT M. WEST /a TRI-CITY PRODUCE.
CA Docket No. RD-87-373.
'ault Order issued August 3, 1987.

Respondent was ordered to pay complainant, as reparation, $18,466.85, s 13 percent interest per annum thereon from June 1, 1986, until paid.

TOM MCLEAN CO. v. S&K FARMS INC.
PACA Docket No. RD-87-385.
Default Order issued August 28, 1987.

Respondent was ordered to pay complainant, as reparation, $2,950.00, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

J. S. MCMANUS PRODUCE CO., INC. v. J. SEGARI AND CO., INC.
PACA Docket No. RD-87-409.
Default Order issued August 12, 1987.

Respondent was ordered to pay complainant, as reparation, $11,814.35, plus 13 percent interest per annum thereon from May 1, 1986, until paid.

HARRY MELMAN, d/b/a MELMAN FOOD SALES v. VINCENT D. MAENZA, d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS.
PACA Docket No. RD-87-380.
Default Order issued August 4, 1987.

Respondent was ordered to pay complainant, as reparation, $51,275.80, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

MO-BO ENTERPRISES INC. v. B.H. COMPANY, INC.
PACA Docket No. RD-87-439.
Default Order issued August 26, 1987.

Respondent was ordered to pay complainant, as reparation, $7,338.55, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

JACK M. MONTGOMERY, d/b/a MONTGOMERY PRODUCE & SALE v. RICHARD ITULE PRODUCE, INC.
PACA Docket No. RD-87-381.
Default Order issued August 4, 1987.

Respondent was ordered to pay complainant, as reparation, $8,426.10, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

MURAKAMI FARM INC., a/t/a MURAKAMI PRODUCE CO. v. VINCENT D. MAENZA, d/b/a VINCENT MAENZA BANANA CO, a/t/a MAENZA & SON.
PACA Docket No. RD-87-400.
Default Order issued August 11, 1987.

Respondent was ordered to pay complainant, as reparation, $3,628.75, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

NAAM PACKINH COMPANY v. TWIG OF MIAMI INC., a/t/a BEST PRODUCE.
PACA Docket No. RD-87-442.
Default Order issued August 26, 1987.

Respondent was ordered to pay complainant, as reparation, $450.00, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

NORRIS OKUN INC. v. GREEN GIANT FRUIT FAIR INC.
PACA Docket No. RD-87-427.
Default Order issued August 21, 1987.

Respondent was ordered to pay complainant, as reparation, $974.00, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

PLAINVIEW PRODUCE INC. v. J. SEGARI AND CO., INC.
PACA Docket No. RD-87-414.
Default Order issued August 18, 1987.

Respondent was ordered to pay complainant, as reparation, $1,710.00, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

MICHELE A. PONTARI d/b/a JAMES F. PONTARI BROS. v. P&M PRODUCE INC.
PACA Docket No. RD-87-428.
Default Order issued Agusut 21, 1987.

Respondent was ordered to pay complainant, as reparation, $12,401.98, plus 13 percent interest per annum thereon from December 1, 1986, until paid.

RANCHERO PACKING CO. INC. v. PAT WOMACK INC.
PACA Docket No. RD-87-449.
Default Order issued August 27, 1987.

Respondent was ordered to pay complainant, as reparation, $3,578.40, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

SANDHILL PRODUCE COMPANY INC. v. J. SEGARI AND CO. INC.
PACA Docket No. RD-87-435.
Default Order issued August 25, 1987.

Respondent was ordered to pay complainant, as reparation, $3,620.00, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

SEABOARD PRODUCE DISTRIBUTORS INC. v. GREEN VALLEY CO., INC.
PACA Docket No. RD-87-424.
Default Order issued August 20, 1987.

Respondent was ordered to pay complainant, as reparation, $79,109.2 plus 13 percent interest per annum thereon from December 1, 1986, u paid.

SIGMA PRODUCE CO. INC. v. MCALLEN PRODUCE CO., INC.
PACA Docket No. RD-87-432.
Default Order issued August 25, 1987.

Respondent was ordered to pay complainant, as reparation, $9,747.00, plu 13 percent interest per annum thereon from June 1, 1986, until paid.

SUN GRO INC. v. SOSA PRODUCE CORP.
PACA Docket No. RD-87-375.
Default Order issued August 3, 1987.

Respondent was ordered to pay complainant, as reparation, $1,957.50, pl 13 percent interest per annum thereon from November 1, 1986, until paid

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SUNKIST GROWERS INC. v. VALLEY BROKERAGE INC.
PACA Docket No. RD-87-412.
Default Order issued August 18, 1987.

Respondent was ordered to pay complainant, as reparation, $14,186.25, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

SUNSPROUTS OF TEXAS INC. v. EDNA E. THOMPSON d/b/a FORT BEND COUNTY FARMERS MARKET.
PACA Docket No.RD-87-431.
Default Order issued August 21, 1987.

Respondent was ordered to pay complainant, as reparation, $3,253.50, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

SUNTREAT GROWERS & SHIPPERS INC. v. MCALLEN PRODUCE CO., INC.
PACA Docket No. RD-87-407.
Default Order issued August 12, 1987.

Respondent was ordered to pay complainant, as reparation, $2,419.00, plus 13 percent interest per annum thereon from June 1, 1986, until paid.

SUN WORLD INTERNATIONAL INC. v. VALLEY BROKERAGE INC.
PACA Docket No. RD-87-420.
Default Order issued August 19, 1987.

Respondent was ordered to pay complainant, as reparation, September 1, 1986, plus 13 percent interest per annum thereon from 1,903.95, until paid.

SUN WORLD INTERNATIONAL INC. v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-434.
Default Order issued August 25, 1987.

Respondent was ordered to pay complainant, as reparation, $562.50, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

LOUIS TOMARO BANANA CO. v. MILL ROAD FOOD CO.
PACA Docket No. RD-87-396.
Default Order Issued August 10, 1987.

Respondent was ordered to pay complainant, as reparation, $8,924.50, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

TAMPICO PRODUCE INC. v. CALMO DISTRIBUTING INC.
PACA Docket No. RD-87-418.
Default Order Issued August 19, 1987.

Respondent was ordered to pay complainant, as reparation, $1,650.00, plus 13 percent interest per annum thereon from April 1, 1986, until paid.

TANITA INC. v. SOSA PRODUCE CORP.
PACA Docket No. RD-87-415.
Default Order Issued August 18, 1987.

Respondent was ordered to pay complainant, as reparation, $2,457.00, p 13 percent interest per annum thereon from December 1, 1986, until paid.

TAYLOR BROKERAGE COMPANY INC. v. BRUCE CHURCH INC.
PACA Docket No. RD-87-333.
Stay Order filed August 7, 1987.

Stay Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

By mailgram received July 23, 1987, respondent has moved that this matter be reopened after default. Accordingly, the order of June 29, 1987, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

TEX-SUN PRODUCE INC. v. EUAL D. VAN HORN, d/b/a VAN 1 PRODUCE.
PACA Docket No. RD-87-397.
Default Order Issued August 10, 1987.

Respondent was ordered to pay complainant, as reparation, $23,788.55, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

UMINA BROS. INC. v. TWIG OF MIAMI INC, a/t/a BEST PRODUCE.
PACA Docket No. RD-87-421.
Default Order Issued August 19, 1987.

Respondent was ordered to pay complainant, as reparation, $1,209.60, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

VALDES FARMS INC. v. T&C DOMINGQUEZ INC.
PACA Docket No. RD-87-440.
Default Order Issued August 26, 1987.

Respondent was ordered to pay complainant, as reparation, $1,385.00, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

VAL-MEX FRUIT COMPANY INC. v. STOOPS DISTRIBUTING INC.
PACA Docket No. RD-87-384.
Default Order Issued August 4, 1987.

Respondent was ordered to pay complainant, as reparation, $14,030.10, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

VAL-MEX FRUIT COMPANY INC. v. BOBBY KNOWLES.
PACA Docket No. RD-87-437.
Default Order Issued August 25, 1987.

Respondent was ordered to pay complainant, as reparation, $32,193.27, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

VAL-MEX FRUIT COMPANY INC. v. RIVER BRAND PRODUCE, a/t/a RIVER BRAND FARMS.
PACA Docket No. RD-87-443.
Default Order Issued August 26, 1987.

Respondent was ordered to pay complainant, as reparation, $6,101.15, plus 13 percent interest per annum thereon from August 1, 1986, until paid.

VEG-A-MIX v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-376.
Default Order Issued August 3, 1987.

Respondent was ordered to pay complainant, as reparation, $16,442.40, plus 13 percent interest per annum thereon from September 1, 1986, until paid.

VIRGINIA PRIDE FRUIT PACKERS INC. v. INTERSTATE PRODUCE COMPANY.
PACA Docket No. RD-87-441.
Default Order Issued August 26, 1987.

Respondent was ordered to pay complainant, as reparation, $3,434.00, plus 13 percent interest per annum thereon from December 1, 1986, until paid.

J.C. WATSON COMPANY v. A&E PRODUCE CORP.
PACA Docket No. RD-87-378.
Default Order Issued August 3, 1987.

Respondent was ordered to pay complainant, as reparation, $4,940.00, plus 13 percent interest per annum thereon from December 1, 1986, until paid.

WESTERN TOMATO GROWERS & SHIPPERS INC. v. PAT WOMACK INC.
PACA Docket No. RD-87-379.
Default Order Issued August 4, 1987.

Respondent was ordered to pay complainant, as reparation, $25,035.00 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

WETUMPKA FRUIT CO. INC. v. WILSON WHOLESALE FRUITS & VEGETABLES INC.
PACA Docket No. RD-87-430.
Default Order Issued August 21, 1987.

Respondent was ordered to pay complainant, as reparation, $14,034.00, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

WHITE STAR MARKETING INC. v. WORLD FOODS INC.
PACA Docket No. RD-87-433.
Default Order Issued August 25, 1987.

Respondent was ordered to pay complainant, as reparation, $7,174.55, plus 13 percent interest per annum thereon from March 1, 1986, until paid.

WILLIAM P. WILSON v. CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE CO.
PACA Docket No. RD-87-374.
Default Order Issued August 3, 1987.

Respondent was ordered to pay complainant, as reparation, $6,032.00, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

In re: CONTINENTAL AIRLINES, INC. AND BEN MIKO.
P.Q. Docket No. 328.
Order of Dismissal filed August 18, 1987.

Kevin Thiemann, for Complainant.
Respondent, pro se.
Order of Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

ORDER OF DISMISSAL

Upon Motion thereforc, filed August 11, 1987, the Complaint herein is dismissed as to Respondent Ben Miko.

Copies hereof shall be served upon the parties.

In re: HOEGHI UGLAND AUTO LINER A/S.
P.Q. Docket No. 132.
Decision and Order filed July 13, 1987.

Storage of regulated garbage aborad ship in other than tight, leak-proof and covered receptacles - Failure to file answer.

Jaru Ruley, for Complainant.
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the storage and movement of garbage arriving in the United States on any means of conveyance from foreign countries and localities (7 C.F.R. § § 330.400 *et seq.)*,hereinafter referred to as the regulations, in accordance with the rules of Practice in 7 C.F.R. § § 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on October 7, 1985, by thc administrator of thc Animal and plant Health Inspection Service, United States department of Agriculture. The complaint alleged that on or about April 22, 1985, the respondent stored regulated garbage aboard the vessel M/V Hual Trader, which was docked at Jacksonville, Florida, in violation of section 330.400 (b)(1) of the regulations (7 C.F.R. § 330.400 (b)(1 in that the garbage was not contained in tight, leak-proof, covered receptacles. the Complaint was served upon the respondent on October 12, 1985.

The respondent failed to file an Answer responding to the allegations contained in the Complaint. This failure to respond to the allegations contained in the Complaint is deemed an admission of said allegations and constitutes a waiver of hearing. (7 C.F.R. § § 1.136(c) and 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Hoeghi Ugland Auto Liner A/S, is a foreign business entity having its principal place of business at P.B. 777 Sentrum, Dronningensgape 40, Oslo 1, Norway. Its duly authorized agent in the United States is McGiffin and Company, Inc., Box 3, Jacksonville, Florida 32201.

2. On or about April 22, 1985, the respondent stored regulated garbage aboard the vessel M/V Hual Trader, which was docked at Jacksonville, Florida, in violation of section 330.400(b)(1) of the regulations (7 C.F.R. § 330.400 (b)(1) in that the garbage was not contained in tight, leak-proof, covered receptacles, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 330.400(b)(1) of the regulations (7 C.F.R. § 330.400(b)(1).

Therefore, the following Order is issued.

Order

The respondent, Hoeghi Ugland Auto Liner A/S, is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. Please indicate the docket number of the Decision and Order on the check. This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final August 21, 1987.-Editor]

In re: TRISH LINGRED.
P.Q. Docket No. 258.
Order of Dismissal filed August 28, 1987

Robert Broussard, for Complainant.
Respondent, pro se.
Complaint Dismissed issued by Dorothea A. Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Pursuant to Motion therefor, filed August 24, 1987, the Complaint in the above-entitled action is hereby dismissed.

Copies hereof shall be served upon the parties.

In re: BEVERLY ANN PETERS.
P.Q. Docket No. 227.
Default Decision and Order filed June 26, 1987

Importation of mangoes without permit - Failure to file answer.

Jaru Ruley, for Complainant.
Respondent, pro se.
Default Decision and Order issued by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 C.F.R. § § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § § 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on March 27, 1986, by the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 13, 1985, the respondent imported mangoes into the United States in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the mangoes were not inported under permit as required.

On March 31, 1986, the complaint was sent to Ms. Peters by certified mail, return receipt requested. The Postal Service returned the envelope April 28, 1986, as "unclaimed." The complaint and related documents were then remailed by regular mail to respondent at thesame address. The Postal Service did not return this envelope. (7 C.F.R. 1.147(b)(3))

The respondent did not file an answer to the complaint. this failure to file an answer is deemed, for purposes of this proceeding, to be an admission of the allegations contained in the complaint and, consequently, a waiver of the hearing. (7 C.F.R. 1.136(c) and 1.139)

Complainant then moved for entry of a Default Decision and Order. The certified mail (with return receipt requested) envelope was returned on October 14, 1986, by the Postal Service as "unclaimed." Then the motion was remailed October 16, 1986, by regular mail (7 C.F.R. 1.147(b)(3)) which was also "returned to sender" October 24, 1986 by the Postal Service after "attempted" but unsuccessful delivery because addressee was "not known." [1]

The United States Department of Agriculture Judicial Officer ruled tha service of the motion was valid and the default decison and order should be entered in reliance on In re Landeen, 45 Agric. Dec. _____ (Oct. 21, 1986). In re Beverly Ann Peters, Ruling on Certified Question, 46 Agric.

Accordingly, the material facts alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to

[1] However, a certified mail return receipt signed "Beverly Ann Peters", delivered to that same address, was returned by the Postal Service December 9, 1986 (serving the question certified to the Judicial Officer November 19, 1986).

section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Beverly Ann Peters, is an individual whose address is 415 East 94th Street, Brooklyn, New York, 11212.

2. On or about December 13, 1985, the respondent imported mangoes into United States at Jamaica, New York, from the country of Guyana, in violation of section 319.56(c) of the regulations (7 C.F.R. § 319. 56 (c)), because the mangoes were not imported under permit, as required by 319.56-2(e)).

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56(c) of the regulations (7 C.1F.R. § 319.56(c)).

Therefore, the following Order is issued.

Order

The respondent, Beverly Ann Peters, is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00).

This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within ninety (90) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service upon the respondent, unless there is an appeal to the Judicial Officer within 30 days of service. (7 C.F.R. § 1.145 (a), and § 1.142 (a)).

[This default decision and order became final August 7, 1987.-Editor]

In re: WILEY PRENTICE.
P.Q. Docket No. 161.
Decision and Order filed August 12, 1987.

Examination of baggage - Time and place - Airline crew member.

The Judicial Officer reversed Judge Palmer's decision, which had assessed a civil penalty of $250 against respondent for failing to present one piece of baggage in his possession at Honolulu International Airport for the required inspection. The Judicial Officer dismissed the complaint with prejudice. The regulation merely states that all baggage "shall be subject to an examination by an inspector." Although the words "subject to" do not normally connote a personal obligation, in view of the weight to be attached to the Administrator's interpretation, in his own regulation, and the fact that respondent knew that the Administrator construed the regulation to require respondent to present his baggage for inspection, I am willing to construe the regulation to impose a requirement that airline crew member present their baggage at a designated baggage check-in station prior to departure. However, respondent had his baggage inspected at the public's inspection station, before he entered the "sterile" area, since he come to the airport about 4 hours before the flight departed, when he was not on duty. He also presented his baggage for inspection about 45 minutes before departure, after he was paged by the inpector. Hence he complied with the regulation. The regulation cannot be construed as requiring him to present his baggage for inspection a certain numer of minutes prior to

departure, or to prohibit him from entering the "sterile" areas by means of the public's inspection station, when he come to the airport (off duty) 4 hours before departure time. Respondent may be entitled to an award of fees and expenses under the Equal Access to Justice Act, even though the Department's regulations erroneously state that the Act is not in effect as to actions instituted after September 30, 1984, and the reguations do not include the Plant Quarantine Act in the list of statues under which awards of fees and expenses may be made.

Jaru Ruley, for Complainant.
Stephen Glassman, Los Angeles, California, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a, 167), and regulations promulgated thereunder (7 C.F.R. § 318.13 *et seq.*), in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on December 23, 1986, assessing a civil penalty of $250 against respondent for failing to present one piece of baggage in his possession at Honolulu International Airport for the required inspection.

On February 3, 1987, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. § § 556 and 557 has been delegated (7 C.F.R. § 2.35).[1] On March 18, 1987, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, complainant has failed to prove a violation, and the complaint is dismissed with prejudice.

Findings of Fact

1. The respondent, Wiley E. Prentice, is an individual with a mailing address of Box 303, Anahola, Hawaii 96703.

2. The respondent has been a crew member (i.e., a pilot) for Western Airlines for approximately 19 years.

3. From 14 years of flying to and from Hawaii, the respondent was aware of the procedure that crew members destined to the continental United States from Hawaii were to have their baggage inspected at a particular agriculture inspection station, which is at the baggage check-in table in front of each airline's ticket counter. Each airline furnishes a daily list of its crew members for each flight to the agriculture inspector, and the inspector checks off the crew members' names as they are inspected.

4. The agriculture inspector at the baggage check-in table in front of each airline's ticket counter inspects all of the baggage of crew members, but only the check-in baggage of passengers. The hand-carried baggage of passengers is inspected by an agriculture inspector at the Security Check Point, where

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

passengers are simultaneously checked by a security officer and an agriculture inspector. The hand-carried baggage of passengers is X-rayed, and one monitor of the X ray is read by a security officer and a separate monitor of the X ray is read by an agriculture inspector. Crew members in uniform are permitted to bypass the inspectors at the Security Check Point without having their hand-carried baggage inspected either by the security officer or the agriculture inspector at that point.

5. On September 1, 1982, all airlines serving Honolulu (with connections to the continental United States or other designated points) were notified by complainant that effective September 9, 1982, there would be a 100% check-in baggage marking system in effect. The notice states (CX A):

> This is to inform you that effective September 9, 1982, we will implement the proposed 100% check-in baggage marking system to preclude uninspected baggage from leaving Hawaii to the U. S. Mainland. All check-in baggage that have gone through our inspection, whether inspected or not, will be marked with colored stickers in areas visible to your employees.
>
> Cooperation from your employees at the baggage check-in counters is mandatory. They must call to our attention all passengers with unmarked baggage or refer passengers back to our inspection counters for inspection. Our Officer will be roving back and forth to see that all baggage are marked; however, he/she may miss a few. In this event, our Officer can be signaled with the light system that DOT will install. When a passenger is referred to our Officer, he/she may interrogate passenger and sticker baggage or send passenger back to our counters for inspection. Please be forewarned that, in most cases, passengers will be sent back to our inspection counters for inspection due to the lack of adequate space and facility at all check-in counters. We will not examine baggage on the floor.
>
> We will also monitor all baggage make up areas for uninspected or unmarked baggage. Our Officer will pull off all uninspected or unmarked baggage for inspection. Your supervisor will be contacted to open baggage for inspection. Baggage will be inspected only in the presence of a supervisor or designee. In no case will we allow uninspected baggage, which is suspected of carrying contraband, to go forward to the Mainland. Our Officer assigned to monitor the baggage make up area will use his/her discretion in making decisions, based on risk factors, whether to release without inspection or hold for inspection.
>
> All hand-carried items will be inspected at the Security Checkpoints in order to provide relief at our inspection counters for this time-consuming process of marking every check-in baggage.
>
> Please acknowledge receipt of this letter by signing and dating the attached copy and returning it to us in the enclosed stamped self-addressed envelope.

6. On March 9, 1983, complainant advised the airlines serving Honolulu that some airline employees were bypassing agricultural inspection. The letter states (CX C):

> It has come to our attention that a few airline employees are bypassing agricultural inspection when traveling to the mainland. They have used office spaces and security doors accessible to them when working to bypass the inspection.
>
> Whether they fly on passes or are deadheading, our regulations still apply and their baggage must be presented for inspection. All employees should be reminded, for violations could be filed.

7. The agriculture inspector has discretion as to whether to open baggage presented for inspection, or whether to merely question the person as to the contents of the baggage. Any baggage presented to the inspector has been "inspected," irrespective of whether the inspector opens the baggage.

8. In order to facilitate the inspection process, complainant has defined "sterile" areas, and notified interested parties, including all airline carriers serving Honolulu, of the sterile areas. The notice dated March 7, 1985, is as follows (the "second level area" is of particular importance here inasmuch as that is the level at which the baggage check-in points and Security Check Points for departing passengers are located) (CX D):

> This will make a matter of record and define "sterile" areas for USDA, APHIS, PPQ quarantine purposes.
>
> For the enforcement of Federal Regulations 7 CFR 318.13, 318.16, 318.30, 318.47, 318.60, and 301.87, all baggage (hold and hand-carried), and cargo must be inspected and released by an Officer of the United States Department of Agriculture prior to being accepted by the airlines for transport from Hawaii to the Continental United States. To facilitate the movement, the following areas will be considered "sterile" for USDA purposes:
>
> 1. All hold baggage assembling areas of each airline. This includes all ground level areas with the capability of accepting hold baggage on conveyor belts from the second floor level and the interline baggage assembling area located at the interisland terminals.
>
> 2. The entire second level area beyond the Security Checkpoints which encompasses the Ewa and Diamond Head Gull Wings, the Central Concourse, and all walkways leading to these areas and the Main Terminal Shopping and Lounge areas.
>
> 3. The entire ground level area beyond all Airport Access Entry Gates, aircraft parking areas, and ramp areas in general, delineated by the Diamond Head Gull Wing on one side and the Ewa Gull Wing on the other side.

Uninspected baggage (includes hand-carried items) and/or cargo which do not meet our requirements in any of the above-mentioned area will be cause for our Officers to file violation reports. Each violation will be subject to a Civil Penalty of up to $1,000.00 and/or a Criminal Penalty of up to $5,000.00 or a year in jail, for the individual, the agent, and the airline involved.

Please remind all of your employees that we are and have been monitoring all areas and all violations will be processed for prosecution.

To prevent the spread of fruit flies and other dangerous plant pests (which occur in Hawaii, but not in the Continental U.S.) that could endanger our nation's multibillion dollar agricultural industry, we must apply strict quarantine measures to prevent host fruits and vegetables and other plant material from being transported to the Continental U.S.

Your cooperation is requested in this matter.

9. On August 13, 1985, the respondent's name, along with names of other Western Airlines crew members destined from Hawaii to the continental United States, was on a list at the designated agriculture inspection station in front of Western Airlines' ticket counter. Respondent's flight was originally scheduled to depart at 11:25 p.m. (or 11:55 p.m.), but during the evening it was rescheduled to depart at 12:25 a.m.

10. Shortly after 11:00 p.m. on August 13, 1985, when the respondent had not reported to the designated agriculture inspection station for inspection of his baggage or personal effects, the agriculture inspector, Dr. Thomas D. Arkle, Jr., had respondent paged at the Western Airlines Operations area. Sometime between 11:15 p.m. and 11:45 p.m., respondent came to the area of the designated inspection station, and his baggage, which consisted of a briefcase, i.e., an attache-type airline case, containing no contraband, was inspected by Dr. Arkle.

11. Prior to being paged by Dr. Arkle, respondent had arrived at the Honolulu airport several hours early, at approximately 8:00 p.m. He was accompanied by Dr. Clarence Greff, Jr., whom he had met on his incoming flight to Hawaii. Respondent was dressed in civilian clothes. In order to eat dinner in a restaurant which was within the sterile area, respondent and Dr. Greff went through the Security Check Point where their baggage, including respondent's briefcase, was inspected and X-rayed by the security officer and the agriculture inspector. After leaving Dr. Greff at about 9:15 p.m. to 9:30 p.m., respondent went to the Western Airlines Operations area, which is in the same sterile area as the restaurant. Respondent did some work in the Western Airlines Operations area, changed into his uniform, and then fell asleep until about 11:00 p.m. Respondent intended to go back to the designated inspection station to have his baggage inspected again, but he forgot to do so until he was paged by Dr. Arkle. Respondent did not leave the sterile area from the time he entered it at approximately 8:00 p.m. until he left it to respond to Dr. Arkle's paging.

Conclusions

In order to prevent catastrophic damage to the agricultural community in the United States, and those dependent upon it, Hawaii has been quarantined. The notice of quarantine states (7 C.F.R. § 318.13):

> § 318.13 Notice of quarantine.
> (a) Pursuant to section 8 of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. 161), and after public hearing, it has been determined that it is necessary to quarantine Hawaii to prevent the spread of dangerous plant diseases and insect infestations, including the Mediterranean fruit fly . . ., the melon fly . . ., the oriental fruit fly . . ., green coffee scale . . ., the bean pod borer . . ., the bean butterfly . . ., the Asiatic rice borer . . ., the mango weevil . . ., the Chinese rose beetle . . ., and a cactus borer . . ., which are new to or not widely prevalent or distributed within and throughout the United States, and Hawaii is therefore quarantined.

As a result of the quarantine, complainant inspects baggage and cargo coming from Hawaii to the continental United States and other specified designations. The inspection regulations provide (7 C.F.R. § 318.13-12; emphasis added):

> § 318.13-12 Inspection of baggage and cargo.
> (a) *Baggage inspection All baggage and other personal effects of* passengers and *members of crews on* ships, vessels, other surface craft or *aircraft moving from Hawaii shall be subject to examination by an inspector* to ascertain if they contain any of the articles or plant pests prohibited movement by the quarantine and regulations in this subpart or Part 330 of this chapter. Such baggage inspection shall be made, at the discretion of the inspector, on the dock or on the ship, vessel, other surface craft or aircraft while in a quarantine or inspection area, either at the port of departure in Hawaii or at the first or any subsequent port of arrival in the continental United States, Guam, Puerto Rico, or the Virgin Islands of the United States, and no baggage or other personal effects of passengers or crew members from Hawaii shall be released until said effects have been inspected and passed. Baggage inspections will not be performed until the person in charge or possession of the carrier ship, vessel, other surface craft, or aircraft provides sufficient space and adequate facilities thereon, or on piers or landing fields for such inspection.

Complainant contends that respondent violated the regulation just quoted by his conduct referred to in Findings 9-11. To prevail, complainant must overcome a number of formidable barriers. The first sentence of the regulation is the critical sentence at issue here, i.e., the issue is whether respondent violated the provision that "[a]ll baggage and other personal effects of . . . members of crews on . . . aircraft moving from Hawaii shall be subject to examination by an inspector. . . ."

At the outset, we must inquire as to whether it is possible for anyone to violate that sentence of the regulation! That is, construing the sentence in its normal manner, it merely states that baggage from Hawaii is liable to be

inspected. The term "subject" is defined as follows (Webster's Third New International Dictionary 2275 (1981)):

> 1: falling under or submitting to the power or dominion of another (children -- to their parents): as a: owing allegiance to or being a subject of a particular sovereign or state (a colony is -- to the mother country) (a -- race) b: SUBJECTED c: OBEDIENT, SUBMISSIVE (be -- to the laws) 2 a: suffering a particular liability or exposure (-- to very severe draughts) (-- to temptation) b: PRONE, DISPOSED (very -- to colds) 3 *archaic* : situated under or below : SUBJACENT 4: likely to be conditioned, affected, or modified in some indicated way : having a contingent relation to something and usu. dependent on such relation for final form, validity, or significance (democratic representatives whose acts are -- to discussion and criticism--M.R. Cohen) (a treaty -- to ratification) *syn see* LIABLE.

"The words 'subject to' normally connote, in legal parlance, an absence of personal obligation." *Commissioner* v. *Southwest Consolidated Corp.*, 315 U.S. 194, 200 (1942). As stated in *S.L. Nusbaum & Co.* v. *Atlantic Virginia Realty Corp.*, 146 S.E.2d 205, 209 (1966), 206 Va. 673:

> The courts have frequently construed the words "subject to." They are words of qualification and notice and not words of assumption.
>
> In S. T. McKnight Co. v. Central Hanover Bank & Trust Co., 120 F.2d 310, 320 (8 C.C.A.), this is said:
>
> "That the words 'subject to all the terms and conditions of said lease' do not impose contractual liability on an assignee to a lessor to carry out the covenants of a lease, seems to be the well supported rule."
>
> In 83 C.J.S. Subject, page 555, the expression "subject to" is defined as follows:
>
> "It normally connotes, in legal usage, an absence of personal obligation, and as ordinarily used does not create affirmative rights."

In *Fry* v. *Mayor & City Council of Sierra Vista*, 466 P.2d 41, 46 (1970), 11 Ariz. App. 490, the court stated:

> Whether or not this property was in fact ultimately subjected to taxation is immaterial, since the term "subject to taxation" merely means liable to taxation rather than that the property must be subjected to taxation.

Similarly, in *Huey* v. *King*, 415 S.W.2d 136, 139 (1967), 220 Tenn. 189, the court stated:

> Furthermore, it is significant that the charter merely provides that property of the kind in question shall be "subject to taxation." Again this provision cannot be construed as a mandate that such property *must* be taxed. This provision merely sets out the classes of property which are subject to the Board's discretion as to whether or not it shall be taxed.

In construing the regulation at issue here, it is well settled that the Administrator's interpretation of his own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), quoted with approval in *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969), and *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

Complainant contends that the first sentence of the regulation just quoted, *viz.*: "All baggage and other personal effects of . . . members of crews on . . . aircraft moving from Hawaii shall be subject to examination by an inspector," properly interpreted, notifies passengers and crew members that their baggage is subject to examination by an agriculture inspector, and, also, places an affirmative duty on the passengers and crew members to place their baggage and personal effects before an inspector for inspection.

Notwithstanding the great weight that must be given to the Administrator's interpretation of his regulation, it is stretching the rules of statutory construction to the limit (or perhaps, beyond) to read an affirmative requirement into the first sentence of the quoted regulation. Nonetheless, in view of the importance of this case to the Nation's agricultural sector, and all those dependent upon it, and since (i) complainant's interpretation was brought to the attention of all airlines, and (ii) respondent was personally aware of the fact that complainant construes his regulation as requiring each crew member to present his or her baggage for inspection, I am willing to stretch the regulation to the point of imposing a requirement on passengers and crew members to present their baggage for inspection.[2] See *In re Warner*, 46 Agric. Dec. ___ (Apr. 1, 1987) (ruling on certified question) (passenger cquired to submit baggage for inspection).

Second, for complainant to prevail here, the regulation (7 C.F.R. § 318.13-12(a)) must be construed as requiring respondent to present his baggage for inspection before taking it aboard the plane. This, again, is a formidable barrier since the face of the regulation states that the inspector may inspect baggage on the aircraft or on the ground, and either before the plane leaves Hawaii or upon arrival in the continental United States.

It is difficult to construe that regulation as requiring a crew member to present his baggage for inspection prior to the time the baggage is carried aboard the aircraft. But here, again, since complainant's construction of the regulation has been brought to the attention of the airlines serving Hawaii, and respondent was personally aware of complainant's interpretation, I am willing to stretch the regulation to require respondent to present his baggage for inspection prior to carrying the baggage aboard the aircraft.

Third, for complainant to prevail here, the regulation must be stretched (by the interpretative process) to impose a duty on crew members to present their baggage at the designated baggage check-in station for their airline. This, too, is stretching the regulation to (or perhaps, beyond) the breaking point, but, again, since complainant's interpretation was given to all airlines serving Hawaii, and respondent was personally aware of this interpretation (or

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[2] If a case is litigated involving a passenger, complainant would be well advised to explain in detail the steps that have been taken to make the public aware of this requirement, together with a picture of complainant's notice of the inspection requirement, and a diagram indicating every relevant location at which the notice appears. (I hope that complainant has "clarified" the regulations before the issue as to whether the regulation can be construed to impose an obligation on passengers or crew members is decided by a reviewing court.)

"protocol" as he calls it (Tr. 106-07)), I will accept complainant's construction of the regulation.

However, to be successful, complainant must prevail as to one of the remaining two issues. That is, the regulation must be construed either (i) to require respondent to check in at the designated baggage check-in table prior to a certain number of minutes before the scheduled departure time (the time-limit theory), or (ii) to make it unlawful for respondent to enter the sterile area after having his baggage inspected by the agriculture inspector at the Security Check Point, even if he later has his baggage inspected at the designated baggage check-in table (the prohibited-entry theory). I find no merit in complainant's position as to either issue.

First, as to the time-limit theory, complainant prevails here if the regulation is construed to require that a crew member check in at the designated baggage check-in station by a fixed time prior to departure time, e.g., 1¼ hours prior to departure. This is because after respondent passed through agricultural inspection at the Security Check Point at about 8:00 p.m., he forgot to check in at the designated baggage check-in station until he was paged by Dr. Arkle, a little more than an hour before the plane's rescheduled departure time.[3]

Although respondent had forgotten to check in at the designated baggage check-in station before he was paged by Dr. Arkle, it is possible that something might have triggered his memory, even without being paged. Notwithstanding the weight that must be afforded to the Administrator's interpretation of his own regulation, I am unwilling to stretch the regulation, by the process of interpretation (or, rather, by the abuse thereof), to interpolate a time requirement into the regulation. Accordingly, complainant cannot prevail on the theory that respondent violated the regulation because he waited until he was paged by Dr. Arkle to present his baggage for inspection at the designated baggage check-in station.

In this respect, there is no evidence in the record to indicate that complainant has ever advised the airlines that crew members must have their baggage inspected at the designated baggage check-in station by a fixed number of minutes before the scheduled, or rescheduled, departure time. Complainant's interpretation, in this respect, seems to be an afterthought, presented for the first time in his brief filed after the hearing in this proceeding (probably concocted after complainant gave up on the prohibited-entry theory).

Although complainant's brief filed before the ALJ is not crystal clear as to complainant's theory of the case, complainant seems to argue that respondent violated the regulation because he failed to present his baggage for inspection at the designated baggage check-in station before he was paged by Dr. Arkle. Complainant's brief states (Brief at 2-4, 7-8) (Note the absence of any prohibited-entry argument, i.e., complainant's brief is completely consistent with the view that no violation would have occurred if respondent had promptly returned to the designated inspection station after eating dinner and changing into his uniform in the sterile area):

> The respondent's Answer and evidence presented at the hearing in this matter establish that the Agency interpreted the regulation to require

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[3]If the regulations were to be construed to require check in prior to a certain time period before departure, the time period would have to be based on the delayed, i.e., rescheduled departure time, rather than the original, scheduled departure time since many flights are delayed for substantial periods. A crew member staying at a hotel in Honolulu, e.g., might ascertain by a telephone call that his or her flight will be several hours late.

crew members of flights destined for the continental United States from Hawaii to report for agriculture inspection of baggage and personal effects at inspection stations designated for their particular airline; that the respondent was well aware of the Department of Agriculture's requirement that he, as a flight crew member, be inspected and checked at the agriculture inspection point designated for crew members of his particular airline; that this was at least the second time that the respondent had been called from his airline's operations control area for inspection at the proper agriculture inspection point; that these measures are necessary to prevent the artificial spread of plant diseases and pests from Hawaii to the continental United States; and that, in view of these circumstances, assessment of the proposed civil penalty is appropriate.

Proposed Findings of Fact

. . . .

3. From 14 years of flying Hawaii, the respondent was aware of the procedure that crew members destined to the continental United States from Hawaii were to check in at a particular agriculture inspection station.

4. That on August 13, 1986 [sic], the respondent's name, along with names of other Western Airline crew members destined from Hawaii to the Continental United States, was on a list at a designated agriculture inspection station.

5. That at approximately 2300 hours on August 13, 1985, the respondent had not reported to the designated agriculture inspection station for inspection of his baggage and/or personal effects.

6. That at approximately 2300 hours on August 13, 1986 [sic], the respondent was in the Western Airline operations area, within the defined "sterile" area.

7. That only after being summoned to have his baggage and/or personal effects inspected did the respondent report to the designated agriculture inspection station.

. . . .

Issues Presented

. . . .

I. The Agency's interpretation of section 318.13-12 of the regulations (7 C.F.R. § 318.13-12), requiring members of airline crews moving from Hawaii to the continental United States to subject their baggage and personal effects to examination by an inspector at a designated agriculture inspection station, is neither plainly erroneous nor inconsistent with the regulation.

. . . .

II. Respondent, Wiley E. Prentice, failed to subject his personal effects to examination by an inspector at a designated agriculture inspection station as required.

Testimony at the hearing clearly establishes that on August 13, 1985, Wiley E. Prentice, a Western Airlines crew member, did not present his briefcase for examination at the agriculture inspection station designated to examine baggage and other personal effects of Western Airlines' crew members. Mr. Clarence Greff, Jr. and the respondent testified that when they entered the main terminal (of Honolulu International Airport) they went through a metal detector, which would have been the combined inspection station, and on to the restaurant inside the Terminal (Tr. 91-93, 95-96). Mr. Prentice further testified that after leaving the restaurant, he went directly to Western Operations within the sterile area (Tr. 98, C.Ex. D). It was not until some three hours later, after Mr. Thomas Arkle, Plant Protection and Quarantine Officer, called Western Operations to inquire as to the respondent's whereabouts, that Mr. Prentice reported to the agriculture inspection station for examination of his briefcase. (Tr. 55, 56, 101, 102). It should be pointed out that Mr. Arkle called Western Operations because the respondent's name, appearing on the crew member list provided by Western Airlines, had not been marked in any manner to indicate that Mr. Prentice had subjected his personal effects for examination at that inspection station. (Tr. 51, 52, 58).

In his answer and again in testimony, the respondent admits both his awareness of the inspection procedure for crew members and that on August 13, 1985, he failed to comply with such procedure until summoned from the "sterile" area within the Western Operation. (Tr. 101, 102, 111, 112). Therefore, it is clear that the respondent violated section 318.13-12 of Title 7 of the Code of Federal Regulations on August 13, 1985.

The last two paragraphs quoted above under subheading "II" constitute complainant's entire argument as to this point. Complainant's theory seems to be limited to the argument that respondent violated the regulation because he failed to have his baggage inspected at the designated inspection station until he was summoned by Dr. Arkle.

The ALJ, however, did not adopt the time-limit theory but, rather, adopted the prohibited-entry theory (which, as shown below, was complainant's original theory of the case). The ALJ's findings and conclusions closely follow complainant's findings and conclusions, except that the ALJ makes it clear that respondent's unlawful conduct occurred the moment he entered the sterile area without first having presented his baggage for inspection at the designated baggage check-in station. For example, the ALJ states (Initial Decision at 2-3; emphasis added):

> The evidence of record establishes that the Agency interpreted the regulation to require crew members of flights destined for the continental United States from Hawaii to report for agriculture inspection of baggage and personal effects at inspection stations designated for their particular airline *before entering a so-called "sterile area" consisting of the airline's operations control area*; that the respondent was well aware of the Department of Agriculture's requirement that he, as a flight crew member, should present his baggage for examination at the agriculture inspection point designated for crew members of his particular airline *before entering a "sterile area"*; that respondent did not present his briefcase for inspection at the

designated inspection station until he was paged and *after he had entered the "sterile area"*; that this was the second time that the respondent had been called from his airline's operations control area for inspection at the proper agriculture inspection point; that these measures are necessary to prevent the spread of plant diseases and pests from Hawaii to the continental United States; and that, in view of these circumstances, assessment of a two hundred fifty dollars civil penalty, as proposed by complainant, is appropriate.

Findings of Fact

. . . .

3. From 14 years of flying Hawaii, the respondent was aware of the procedure that crew members destined to the continental United States from Hawaii were to check in at a particular agriculture inspection station *before entering a "sterile area" consisting of the airline's operations control area.*[4]

After the ALJ adopted the prohibited-entry approach, complainant expressly adopted it in opposing respondent's appeal, i.e., complainant argues that "there was substantial evidence to rebut the presumption of Respondent's compliance with the requirement that he present his baggage for examination at the designated agriculture inspection station prior to entering the airport's 'sterile area'" (Opposition to Respondent's Appeal at 4). That was undoubtedly complainant's original theory of the case since the "REPORT OF VIOLATION," which led to the institution of the complaint, states (RX 1 at 1-2, item 7):

[E]ach crew member is required to present all of his baggage for inspection and have his name "removed" from the list prior to entering the "sterile area" of the airport. . . . In this instance, . . . [respondent] did proceed directly into the sterile area of the airport to the Western Airlines operations office without clearing US agriculture predeparture inspection (see attached memos).

In addition, complainant presented evidence at the hearing expressing the view that it is unlawful for a crew member to enter the sterile area without first passing through the designated baggage check-in station (Tr. 20-22, 69-70, 72, 76-80).

[4]Finding 3 as proposed by complainant, i.e., without the emphasized language, is supported by the record. The ALJ's Finding 3 is not supported by the record. The ALJ's remaining findings are taken virtually verbatim from complainant's proposed findings, and the ALJ's conclusions closely follow complainant's conclusions. Specifically, the ALJ's conclusions under his subheading "II" are taken practically verbatim from complainant's conclusions under the subheading "II" quoted above. But the ALJ's specific findings and preliminary statements to the effect that it was unlawful for respondent to enter the sterile area before being inspected at the designated baggage check-in station give a completely different meaning to the ALJ's conclusions under subheading "II."

Apparently, however, complainant abandoned the unlawful-entry theory[5] as a result of Dr. Arkle's admission that a crew member who arrives 3 to 4 hours before his flight, dressed in civilian clothes, may lawfully enter the sterile area by being inspected as if he were a passenger, i.e., at a Security Check Point. (This admission, emphasized in the quoted testimony below, was preceded by less specific testimony to the contrary.) Specifically, Dr. Arkle testified (Tr. 78-80; emphasis supplied):

> Q. But you are prepared to admit that there are circumstances when a crew member would be in the sterile area and have gone through an inspection; aren't you?
> A. Without --
>
> Q. Without being checked off.
> A. Not legally.
>
> Q. Excuse me?
> A. Not legally.
>
> Q. What is the illegality?
> A. The crew member, we would have no control and no knowledge of whether or not the crew member had gone through an inspection simply because the crew member has access to areas of the airport without going through an inspection.
>
> Q. So your presumption then, Mr. Arkle, is that every crew member is attempting to avoid Agricultural inspection?
> A. No, sir.
>
> Q. Is it your presumption that every crew member wants to go through Agricultural inspection?
> A. Not that they want to, but that they do.
>
> Q. That's fine. So your presumption is that every crew member does go through Agricultural inspection?
> A. We have documented instances where they have not.

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[5]In view of (i) the specific statements in the "REPORT OF VIOLATION" that it is unlawful for a crew member to enter the sterile area without first being inspected at the designated baggage check-in station, (ii) complainant's evidence to the same effect (Tr. 20-22, 69-70, 72, 76-80), and (iii) the ALJ's comment at the hearing that he agreed with complainant's theory that it is a violation for a crew member to enter the sterile area before having his name checked off at the designated baggage check-in station (Tr. 85-87), when complainant then filed a brief referring repeatedly to the requirement for a crew member to check in at a particular agriculture inspection station, but omitting the vital phrase (repeatedly added by the ALJ) "before entering a 'sterile area,'" the omission of that vital phrase must have been intentional! That phrase was originally the heart of complainant's case. Surely complainant's attorney could not have neglected, by oversight, to leave out the heart of the case in complainant's original brief.

Q. No, no, Mr. Arkle. Your presumption is that every crew member does go through?

JUDGE PALMER: This is becoming very argumentative. Let us move on.

BY MR. GLASSMAN:

Q. *Is it possible for a crew member to report to the Airport prior to his flight, early, and go through inspection as if he were a passenger?*

A. *What is early?*

Q. *Three or four hours before his flight.*

A. *Is he in uniform?*

Q. *No. Civilian clothes.*

A. *Yes.*

Q. *And go through inspection?*

A. *Yes.*

Q. *And during that time he would be admitted to the sterile area legally, inspected and passed; correct?*

A. *If he were in civilian clothes, yes.*

Q. Now, suppose that same individual then changes into his uniform because he goes on duty, was not on duty at the time he entered the Airport but was on duty afterwards, changes into his uniform, and he is still in the sterile area. Is the presumption now that he has no longer been inspected?

A. No, sir.

Q. The presumption is he has been inspected?

A. The presumption is we have no knowledge of this person.

Q. Now, did you observe Mr. Prentice approach you after you called Operations?

A. Yes, sir.

Q. Where did he come from?

A. He came from the sterile area.

Q. And your immediate thought was: "Here is someone who has by-passed Ag inspection." Right?

A. My thought for several moments, prior to that, before I ever saw Mr. Prentice, was that he had by-passed Agricultural inspection.

Q. If you had been informed, if you had in fact been informed that he had gone through an Agricultural inspection, you would have said, "Okay. Check off the list and away you go."

A. No, sir.

Q. What would your procedure have been?

A. The normal procedure we would follow is to have that person report to the proper Agricultural inspection station and have his name removed from the list after presenting his baggage for inspection at that counter.

Q. Again, there is no regulation that requires that, only that he be inspected and passed?
A. Yes, sir.

Dr. Arkle's testimony (emphasized above) fits the facts of this case exactly. Respondent was not in uniform and was not on duty at 8:00 p.m. when he went through agricultural inspection at the Security Check Point 3 or 4 hours before his flight was originally scheduled for departure. (His original entry into the sterile area 3 or 4 hours early was for the purpose of eating dinner with an acquaintance at a restaurant in the sterile area.)

When he went through the Security Check Point, including agricultural inspection, "as if he were a passenger," while in civilian clothes, he was "admitted to the sterile area legally, inspected and passed" (Tr. 79), according to Dr. Arkle.[6]

But if even Dr. Arkle had testified to the contrary, no amount of reasonable stretching can transmute the simple statement that a crew member's baggage "shall be subject to examination by an inspector" into a prohibition against entering the sterile area by means of the Security Check Point inspection (rather than the designated baggage check-in station), when the crew member has arrived several hours before the flight, is not on airline duty, and is not in uniform.

As to this issue, it is quite significant that complainant did not introduce into evidence the written instructions to the airlines setting forth the procedure to be followed by crew members in complying with complainant's inspection procedure. The omission of that vital document (or documents) is highlighted by the fact that other documents of far less significance (see Findings 5-6, 8) were introduced into evidence by complainant. Although complainant's witnesses testified that the airlines had been advised of complainant's procedures, the most persuasive evidence, i.e., the written notices to the airlines, were not introduced into evidence by complainant as to the requirements for checking in at the designated baggage check-in station. Nothing in the record leads me to infer that the written notices expressly advised the airlines that it is unlawful for crew members to come to the airport several hours in advance of their flight, not in uniform, and enter the sterile area by means of a Security Check Point, without first going through the designated baggage check-in station.

If the airlines had been expressly advised of the unlawful-entry theory, i.e., that it is unlawful for crew members who arrive early in civilian clothes to proceed into the sterile area through the Security Check Point (where their baggage is inspected by an agricultural inspector), we would then have to decide whether the regulation could be stretched, by interpretation, to include

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[6]It is doubtful whether respondent could have had his name checked off at the designated baggage check-in station while he was in civilian clothes. He testified that, after the incident involved in this case, he went to the designated baggage check-in station in civilian clothes, stating "I am Prentice. I'm on the list. I'm presenting myself for inspection," and that the inspector said, "I can't check you off because you are not in uniform" (Tr. 107). No rebuttal evidence was offered by complainant. (After respondent argued with the inspector and insisted that his name be checked off, it appears that the inspector did so (Tr. 107)). Since respondent's uniform was in the sterile area on August 13, 1985 (at Western Airlines Operations area), it is quite possible that he would not have been permitted by the inspector to have his name checked off until he entered the sterile area and obtained his uniform.

such a prohibition. Nothing in this decision should be regarded as deciding, or suggesting, what the decision will be, if in a future case, complainant expressly advises the airlines of the unlawful-entry interpretation.[7]

For the foregoing reasons, I disagree with complainant's position here, in view of the present regulations (or, rather, lack thereof).[8] In this respect, I have no quarrel with complainant's view that all of the requirements and prohibitions which complainant seeks to enforce here are reasonable, i.e., there is a reasonable basis for including all of them in regulations. This is highlighted by the numerous violations detected by complainant. The interception by complainant of more than one million prohibited items per year is explained by Ron Hall, Office of Information, USDA, as follows (USDA News, Vol. 45, No. 9, at 3 (Oct. 1986):

> The beagle is the Eagle Scout of dogs. It is loyal, courageous, obedient, and patient. And now it is an official USDA employee.
>
> That's because the Department's "detector dog" pilot project is being expanded and made a permanent program under the name "Beagle Brigade."
>
> The Beagle Brigade is a project of the Animal and Plant Health Inspection Service, the agency charged with protecting U.S. agriculture against the introduction of foreign animal and plant pests and diseases. The green-jacketed beagles, sniffing baggage for prohibited fruit and meat from abroad, detect fruit or meat in passenger baggage in those U.S. international airports at which they and their handlers are stationed.
>
> Trained to sit
>
> The beagles are trained to sit when they discover a suspect suitcase. A green quarantine tag is then placed on the bag and a green "A" is marked on the traveler's Customs Declaration Card. The luggage then

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[7]Complainant is, however, urged to put his requirements and prohibitins in writiing in the Federal Register rather than to merely announce in the Federal Register that an inspection program is in effect, and depend on letters, memoranda, posters, etc., to fulfill complainant's duty to inform the public of ovligatons and prohibitions which, if violated, subject the public to civil penalties.

[8]Respondent may be entitled to an award of fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504 (Supp. III 1985)). I would not have advised respondent of that right except for the fact that the Department's regulations have not been amended since 1982, and they erroneously state that the Act is not in effect as to actions instituted after September 30 1984 (7 C.F.R. § 1.182). In addition, the Department's regulations specifying the statutes und which awards of fees and expenses may be made does not list the Plant Quarantine Act C.F.R. § 1.183(a)), notwithstanding the fact that civil penalties under the Plant Quarant Act can only be assessed "after notice and an opportunity for an agency hearing on the rec (7 U.S.C. § 163), and, therefore, this proceeding is an "adversary adjudication" (5 U.S.C 504(b)(1)(C) (Supp. III 1985)), subject to an award for costs and fees (5 U.S.C. § 504(a)((Supp. III 1985)). Respondent may file an application for fees and expenses under th provisions of 7 C.F.R. § 1.180 et seq., as if they were expressly applicable to this proceeding

must be checked by an APHIS inspector for agricultural products that could harbor a plant or animal pest or disease.

According to APHIS Deputy Administrator *Bill Helms*, the project has been one of the most successful ever undertaken to protect American agriculture, both in terms of effectiveness and in getting a vital message to the public.

"We estimate that our dogs have an average success rate of 80 percent. And the more they work, the better they get," Helms said. "Their presence in airports is a constant reminder to travelers of the importance of agricultural quarantine laws."

In 1985 APHIS inspectors cleared for entry over 302 million travelers and millions of pieces of baggage. They also inspected 261,538 planes that brought air travelers and cargo to the U.S.

During that year inspectors made more than one million interceptions of illegal agricultural products. From those interceptions they found 42,717 plant pests and diseases that could have been dangerous to America's agricultural industry. They also intercepted 122,708 lots of unauthorized meat and animal byproducts--with the potential to carry diseases that could infect U.S. livestock and poultry.

Taped to legs

Inspectors have found meat wrapped in foil and hidden in the core of large containers of nonregulated foods or in false bottoms in boxes or suitcases. Fruits and meats have been found taped to the legs of passengers, stuffed in overalls, underwear, and soiled diapers, and wrapped in dirty laundry and in gift boxes with bright paper and colorful bows.

However, the incidence of smuggling has declined since APHIS's civil penalties authority went into effect at all U.S. ports-of-entry in 1984. Persons who smuggle agricultural products can now be fined $25 to $50 on the spot during baggage inspection. If they contest the fines, they may have a court hearing. But if they lose the case, they can be fined up to $1,000.

According to *Karl Boetticher*, plant protection and quarantine assistant staff officer, over $1.2 million has been collected from 42,690 fines since the penalty program began.

13 dogs

Helms noted that, by the end of January, 1987, 13 Beagle Brigade dogs will be working in U.S. airports. Three will join veteran teams at Los Angeles and San Francisco International Airports and JFK International Airport in New York. Others will go to Miami, Atlanta, Chicago, Dallas, and either Boston or Seattle.

Helms stressed the need for public support in preventing outbreaks of costly pest infestations and livestock diseases. "Even though hundreds of APHIS inspectors and the Beagle Brigade do all they can to keep out agricultural contraband, we need every international traveler to remember that a single orange innocently carried into the country might have been the cause of the Mediterranean fruit fly outbreak in California in 1985," he noted.

That outbreak cost $100 million--in public funds--to eradicate.

Notwithstanding the vital importance of complainant's inspection program, until the requirements and prohibitions are set forth in regulations with sufficient clarity to satisfy due process requirements, they cannot be enforced.

As stated in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes omitted):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . . Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Accord Connally v. *General Const. Co.*, 269 U.S. 385, 391-95 (1926). This principle applies to statutes, regulations and orders. 16A Am. Jur. 2d *Constitutional Law* § 818 (1979).

For the foregoing reasons, the complaint must be dismissed. However, i it had not been dismissed, the minimum civil penalty that would have been imposed following a hearing is $500. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985). See also, *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept. 9, 1986) ($1,000 civil penalty imposed in default case for failing to present two pieces of passenger baggage for inspection).

Order

The complaint in this proceeding is dismissed with prejudice.

In re: JAMES RADICAN.
P.Q. Docket No. 259.
Dismissal filed August 28, 1987

Robert Broussard, for Complainant.
Respondent, pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Pursuant to Motion therefor, the Complaint in the above-entitled cause is hereby dismissed.

Copies hereof shall be served upon the parties.

In re: JOSE GUADALUPE ROBLES.
P.Q. Docket No. 334.
Dismissal filed August 11, 1987

Joseph Pembroke, for Complainant.
Respondent, pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Upon Motion therefor, filed August 7, 1987, the complaint filed herein on May 26, 1987, is hereby dismissed without prejudice.

CONSENT DECISIONS ISSUED AUGUST 1987

(Not published herein.-Editor)

Animal Quarantine and Related Laws

CAMENZIND, ARTHUR. A.Q. Docket No. 315. August 12, 1987.

LEROY, RODNEY, JERRY L. SELLON, D.V.M., AGRICULTURAL TECHNOLOGIES OF AMERICA, INC. A.Q. Docket No. 304. August 25, 1987.

RILEY, GORDON A. A.Q. Docket No. 334. August 14, 1987.

SMITH, DENNIS. A.Q. Docket No. 330. August 18, 1987.

Animal Welfare Act

ASPEN AIRWAYS, INC. AWA Docket No. 291. August 28, 1987.

BIRDSONG, LEE. AWA Docket No. 333. August 25, 1987.

FIEBER, ROBERT T., D/B/A SILETZ GAME RANCH. AWA Docket No. 391. August 3, 1987.

WOODLAND PARK ZOOLOGICAL GARDENS. AWA Docket No. 317. August 5, 1987.

Federal Meat Inspection Act

PUDLINER, CHARLES J. JR., D/B/A PUDLINER PACKING. FMIA Docket No. 99. August 12, 1987.

Packers and Stockyards Act

ASKEW, GERALD L. P&S Docket No. 6914. August 5, 1987.

DEMLER, ROBERT H., AND BONNIE L. DEVORE. P&S Docket No. 6896. August 25, 1987.

DOTSON, ADOLPH. P&S Docket No. 6906. August 25, 1987.

DUBUQUE PACKING COMPANY AND MARSTON LA GASSE. P&S Docket No. 6808.
Decision with Respect to Dubuque Packing Co. August 18, 1987.
Decision with Respect to Marston La Gasse. August 18, 1987.

FALFURRIAS LIVESTOCK COMMISSION CO., INC. P&S Docket No. 6842. August 11, 1987.

GRETEMAN, INC., d/b/a WELLS COMMISSION COMPANY, and GLENN J. GRETEMAN. P&S Docket No. 6749. August 12, 1987.

HOLT, EARL. P&S Docket No. 6788. August 25, 1987.

LYNN, EVERETT. P&S Docket No. 6832. August 25, 1987.

M&R LIVESTOCK, INC., WARREN H. SHRUM, LOUIS J. WENDLING, ROY B. BARKDULL, JR., and JOE L. BARKDULL. P&S Docket No. 6744. Decision as to Louis J. Wendling. August 28, 1987.

NORTH CHARLES, a/k/a/ ROBERT NORTH. P&S Docket No. 6764. August 3, 1987.

RENDULIC PACKING COMPANY. P&S Docket No. 6876. August 18, 1987.

RYAN JACK K., and JOHN L. P&S Docket No. 6883. August 28, 1987.

SLOVER, JOHHNY, d/b/a T&J FARMS. P&S Docket No. 6890. August 11, 1987.

VAN TIMMEREN, LEON and HERBERT VAN TIMMEREN d/b/a VAN TIMMEREN FARMS. P&S Docket No. 6911. August 26, 1987.

Plant Quarantine Act

CARIBE FOOD CORPORATION. P.Q. Docket No. 333. August 25, 1987.
